A DIGEST

OF

ENGLISH CIVIL LAW

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BOOK I.—GENERAL

BY

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SCHEME OF THE WORK

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PREFACE

SOME years ago, when the Berlin *Society for Comparative Jurisprudence and Political Economy* was projecting a series of Handbooks on the legal systems of modern civilized communities, the President of the Society approached the Editor of this work with the suggestion that he should undertake the statement of English Law, intended by the Society as the first of its projected series.

The general intention of the Society was to produce a series of works which should be modelled after the pattern of the German Civil Code (*Bürgerliches Gesetzbuch*) which came into force throughout the German Empire on the 1st January, 1900. Such a course was obviously calculated to increase the utility of the series to German readers, both for scientific and practical purposes. But the Society, through its courteous President, Dr. Felix Meyer, offered to its collaborators full discretion to depart from the arrangement of the German Code whenever the circumstances of the occasion rendered such a course advisable.

Even with this liberty, the General Editor felt that the task which he was invited to undertake would be far beyond his powers, unless he were so fortunate as to secure the co-operation of English lawyers able and willing to share with him the burden which it involved. But, having succeeded in obtaining the promise of help from four of his former colleagues of the Oxford Law School, it seemed to

him that to refuse any longer to accept the invitation of the Society would be to neglect an opportunity of international courtesy, as well as of rendering a service to the study of jurisprudence.

The German edition of the work has for some time been in course of preparation; and the first instalment of it, with a learned commentary by Dr. Gustav Schirrmeister, was published in the autumn of last year.* But it has occurred to the Editor and his colleagues, that an edition compiled especially with a view to English and American readers may be of value, not only to lawyers, but to officials and others engaged in the administration or study of English Law. With this idea, the present edition has been undertaken; and the first instalment is now given to the public. Future instalments will, it is hoped, appear at reasonably short intervals. In particular, the Part dealing with the General Law of Contract may be expected before the end of the present year; while much of the later matter has already been composed, and only awaits revision.

It is hardly necessary for the authors of this work to admit the extreme difficulty of stating the rules of English Law in a compact and intelligible form. To criticisms of that kind they are prepared to plead guilty in advance. They urge only that they have striven, by every means in their power, to overcome the difficulty, and that even a modest amount of success in such an endeavour may have its value. In spite of the many excellent treatises which aim at expounding the details of English Law, most lawyers, and not a few laymen, have felt the need of some handy source of information from which an answer to a

* *Das Bürgerliche Recht Englands.* Kommentar von Dr. jur. Gustav Schirrmeister. Berlin: Carl Heymann's Verlag, 1905.

question of principle should be readily and easily obtainable. Such questions arise constantly in practice, as incidental to other matters; and inability to answer them off-hand is often a cause of serious delay and annoyance.

It will be gathered from what has just been said, that this work aims at stating general rules only, not at anticipating every possible application of them. Nevertheless, the authors have carefully avoided the reproduction of mere maxims or vague propositions, which, however useful in their way, are somewhat dangerous guides in practice. On the other hand, there has been no attempt to deal with subjects belonging to the machinery of the law, such as conveyancing and judicial procedure. To have attempted a treatment of these would have resulted in a work on a scale much greater than is here intended.

The authors have in every case endeavoured to quote the authority upon which their statement of the law is based. But it is a well-known fact, that for some elementary legal propositions of great importance it is difficult, if not impossible, to find express authority; and these the authors have ventured to state on their own responsibility, leaving the result of their endeavour to the judgment of legal opinion.

Finally, it may be mentioned that, although each Part of the work is, primarily, the production of the author under whose name it will appear, every statement in the book is the result of careful consideration and discussion by all the contributors.

1st May, 1905.

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GENERAL

SECTION I

PERSONS

TITLE I—NATURAL PERSONS

Legal capacity

1. The legal capacity of a human being commences from the time of his birth; but for certain purposes (§ 63) a child *en ventre sa mère* is treated as already born. Legal capacity is not complete until the attainment of majority.

[The expression "legal capacity" is used in English Law to cover two different notions — the notion of ability to acquire rights (which may be called "passive capacity"), and the notion of the ability to transact legal business ("active capacity"). The former may be said to date from the time of birth, the latter is only completely acquired on the attainment of full age.]

Majority

2. Majority is attained at the commencement of the day immediately preceding the 21st birthday.

Herbert v. *Turball* (1663) 1 Keb. 589.

Legal incapacity

3. The following persons are, for the purposes of English Civil Law, subject to a greater or less degree

of legal incapacity, viz. — persons undergoing sentence after conviction of treason or felony, outlaws, minors, persons of unsound mind (whether so found by inquisition or not), undischarged bankrupts, married women, aliens. (See Bk. I. Sect. III. Tit. I.)

Domicile

4. A person having full legal capacity who resides in a country with the intention of making it his home, acquires a domicile in that country, and retains it until he acquires a domicile elsewhere. No person can have more than one domicile at the same time.

[The notion of "domicile," which is of great importance in civil matters, is still somewhat unsettled in English Law. The statement in the text is generally accepted; but the difficulty of interpretation is great, and the definition of "home" is continually changing with changes of social habits. For a recent discussion of the subject, see *Winans* v. *A.-G.* in the House of Lords [1904] A. C. 287.]

Udny v. *Udny* (1869) L. R. 1 Sc. App. 448. See Dicey, *Conflict of Laws*, 95–8.

Domicile of lunatic

5. A lunatic cannot change the domicile which he had at the time when he began to be placed under restraint as insane.

Urquhart v. *Butterfield* (1887) 37 Ch. D. 382.

Official domicile

6. A person in the naval or military service of the Crown, wherever he may be stationed, retains

the domicile which he had on entering the service, if that domicile was British.

Re Macreight (1885) 30 Ch. D. 168.

Wife's domicile

7. A married woman's domicile is the same as that of her husband, even though she is in fact living apart from him.

Dolphin v. *Robins* (1859) 7 H. L. C. 390. As to the effect of judicial separation, *quære*.

Minor's domicile

8. The domicile of a legitimate minor is that of his father, if living. If his father is dead, and the minor lives with his mother, his domicile is that of his mother, unless the mother has changed her domicile for a fraudulent purpose. The domicile of an illegitimate minor is that of his mother, if living; if she is dead, (probably) her last domicile.

Re Beaumont [1893] 3 Ch. 490.
Potinger v. *Wightman* (1817) 3 Mer. 67; *Urquhart* v. *Butterfield* (1887) 37 Ch. D. 382.

Orphan's domicile

9. If a legitimate minor has no parent living, his domicile is that which his surviving parent had at his or her decease.* It is doubtful whether a guardian (not being the ward's mother) can change the domicile of his ward.

* *Quære*, the domicile of his guardian, if any. (Dicey, *op. cit.* 120–4.)
Douglas v. *Douglas* (1871) L. R. 12 Eq. 625.

Change of minor's domicile

10. A minor cannot by his own act effect a change of his own domicile.

Sharpe v. *Crispin* (1869) L. R. 1 P. & D. 618.

Domicile of origin

11. A person who abandons a domicile which he acquired by his own act, without acquiring a new domicile, re-acquires the domicile which he had at the time of his birth.

Udny v. *Udny* (1869) L. R. 1 Sc. App. 448.

Presumption of death

12. A person who has not been heard of for seven years is presumed in law to be dead; but there is no presumption in law that he died at any particular time during the seven years. And the presumption of death will be rebutted, if the circumstances shew that it is likely that the person in question, though alive, would not be heard of.

Re Phené's Trusts (1870) L. R. 5 Ch. App. 139.
Bowden v. *Henderson* (1854) 2 Sm. & G. 360.

Simultaneous deaths

13. When two or more persons are shewn to have perished in the same disaster, there is no presumption as to the order of their deaths.

[The working of this rule is often attended with great inconvenience, especially when the persons in question are nearly related to each other. The practical result of the rule is, that neither of the persons can be credited with any rights which would have accrued to him had he been held to have survived the other.]

Wing v. *Angrave* (1860) 8 H. L. C. 183. *In the Goods of Beynon* [1901] 1 P. 141.

TITLE II — ARTIFICIAL PERSONS

Associations

14. Associations are either corporate or unincorporate.

[There is now no rule of English law to prevent any number of persons associating themselves for a common lawful object, except that not more than ten persons may associate themselves for the business of banking, and not more than twenty persons may associate themselves for any other business having gain for its object, except as an association under royal or statutory authority (Companies Act, 1862, s. 4). But an unincorporated association is, for legal purposes, very little more than a number of isolated individuals employing common agents.]

Non-corporate bodies

15. Generally speaking, an unincorporated association has no personality which the law will recognise; but —

(*a*) The property of certain classes of unincorporated associations is protected by the provisions of the Criminal Law;

Larceny Acts, 1861, s. 68; 1868, s. 1; Trade Union Act, 1871, s. 12.

(*b*) Certain unincorporated associations, if registered or certified as provided by law, are entitled to enforce against their trustees and officials the due administration of the property held on behalf of such associations.

Building Societies certified before 1857 (6 & 7 Will. IV. (1836), c. 32; Building Soc. Act, 1874, s. 7 & 1894, s. 25); Friendly Societies (Friendly Soc. Act, 1896, ss. 47–50); Collecting Societies (Collecting Soc. Act,

1896, s. 15); Religious & Educational Societies (Trustee Appointment Act, 1850); Literary, Artistic, and Scientific Institutions (Literary & Scientific Institutions Act, 1854); Trade Unions (Trade Union Acts, 1871 & 1876).

(*c*) An unincorporated association, recognised and regulated by Act of Parliament, is liable, to the extent of its associate property, to indemnify persons who have suffered by the wrongful acts of the officers and servants of the association, done in pursuance of the objects of the association.

[The existence of this last rule depends entirely on the general applicability of the decision quoted below, which was in fact given in an action brought against a registered Trade Union. But the language of the judgments in the House of Lords (and, it may be added, the principles of justice) makes it applicable to all classes of associations recognised by the law as entitled to hold property. It should be especially noticed that it is not necessary, in order to make the associate property liable, to prove express authority from the association for the acts complained of.]

Taff Vale R. Co. v. *Amalgamated Soc. of Railway Servants* [1901] A. C. 426.

Corporations

16. Corporations can only be created by the authority of the State, expressed or implied; but, after the exercise from time immemorial of the privileges of a corporation, the necessary authority will be presumed ("Corporations by prescription").

Case of Sutton's Hospital (1613) 10 Rep. 29.

Corporations aggregate and sole

17. A corporation may consist, by the nature of its constitution, of a single individual ("corporation

sole"), or of two or more individuals ("corporation aggregate"). But a corporation aggregate, whose members have become reduced to one, does not thereby become a corporation sole.

[There is, it is believed, no express authority for the last statement in this §; but the results of a different ruling would be curious. The "corporation sole" is, it is believed, peculiar to English Law.]

Corporation sole

18. Whether an individual, who is also a corporation sole, is acting in his individual or in his corporate capacity, is a question of fact in each case.

Doctor Bentley's Case (1726) 2 Str. 913.

Domicile of corporation

19. The domicile of a corporation is, in the case of a trading corporation, the place in which its administrative business is carried on; in the case of any other corporation, the place in which its functions are performed.

Jones v. *Scottish Accident Insurance Co.* (1886) 17 Q. B. D. 421. See Dicey, *Conflict of Laws*, 154–6.

Foreign corporation

20. A corporation which is not domiciled in England is, for the purposes of English Civil Law, a foreign corporation.

Carron Iron Co. v. *Maclaren* (1855) 1 H. L. C., 436.

Powers of foreign corporation

21. Subject to the rules affecting British ships, a foreign corporation can acquire property in England,

and sue and be sued in the English Courts, to the same extent, and in the same manner, as a British corporation.

Westman v. *Aktiebolaget Co.* (1876) 1 Ex. D. 237.

Scottish and Irish corporations

22. A Scottish or an Irish corporation cannot be sued in the English Courts, even though it has branches or agents in England.

Watkins v. *Scottish Imperial Co.* (1889) 23 Q. B. D. 285; *Palmer* v. *The Caledonian Ry. Co.* [1892] 1 Q. B. 823.

Constitution of corporation

23. The constitution of a corporation aggregate is determined by the provisions of the charter, Act of Parliament, statutes, by-laws, or other documents of its incorporation; in the case of corporations by prescription, by immemorial custom.

Government of corporation

24. Subject to the documents of incorporation, and to immemorial custom, administration of the affairs of a corporation aggregate is vested in all the members, assembled at a general meeting. But, unless the meeting is held on a fixed and regular date, it can only deal with matters of which notice has been given to the members a reasonable time beforehand.

R. v. *Harris* (1831) 1 B. & Ad. 936.

R. v. *Langhorn* (1836) 4 A. & E. 538; *Re Bridport Old Brewery Co.* (1867) L. R. 2 Ch. App. 191. It is possible that, if all the corporators attended, and waived the question of notice, the objection could not afterwards be raised. (*R.* v. *Chetwynd* (1828) 7 B. & C. 703–4.)

Majority vote

25. Subject to the documents of incorporation, the decisions of the members assembled at a meeting are arrived at by a majority of the corporators present; but a majority of all the members must be present at the meeting.

Re Horbury Bridge Co. (1879) 11 Ch. D. 115.
R. v. *Bower* (1823) 1 B. & C. 498.

Powers of corporation

26. Subject to the documents of incorporation, and to §§ 27, 28, a corporation has, in general, all the powers and liabilities of an individual, in so far as they are capable of being applied to an artificial person. But a statutory corporation, created by Act of Parliament for a particular purpose, is limited, as to all its powers, by the purposes of its incorporation, as defined by that Act.

[A controversy, largely academic in character, has long existed as to the true theory of the powers of corporations by English Law. The view taken by the text, which is believed to be supported by the best authorities, is, that a corporation is presumed to be capable of doing and suffering anything which an individual can do or suffer, provided that the act or liability is not inconsistent with the very nature of a corporation.]

Eastern Counties Ry. Co. v. *Hawkes* (1855) 5 H. L. C. 348; *Ashbury Railway &c. Co.* v. *Riche* (1875) L. R. 7 H. L. C. 693; *A.-G.* v. *G.E. Ry. Co.* (1880) L. R. 5 App. Ca. 473; *L. C. C.* v. *A.-G.* [1902] A. C. 165. A corporation can even sue for defamation (*South Hetton Coal Co.* v. *N. E. News Ass.* [1894] 1 Q. B. 133); but only in respect of its business or property (*Manchester Corp.* v. *Williams* [1891] 1 Q. B. 94). It was, until recently, the rule that a corporation could not hold property jointly with another corporation or individual. But this disability has been removed. (Bodies Corporate (Joint Tenancy) Act, 1899.)

Mortmain

27. An assurance, to or for the benefit of a corporation, of any interest in land, otherwise than under the authority of a licence from the Crown or an Act of Parliament, works a forfeiture of the interest to the Crown or mesne lord. No corporation (even with such licence as aforesaid) can hold land by copy of court roll; and a corporation sole cannot, except in so far as expressly authorized by Act of Parliament or special custom, acquire personal property.

[The "mesne lord" is primarily the person who, or whose predecessor in title, has created the interest. If the interest in question is a life estate, or a term of years, such person is generally easy to find. But if the interest is a fee simple, then, for reasons which will appear in Book III, it will very likely be impossible to discover the mesne lord. The direct mesne lord has twelve months from the date of the assurance in mortmain in which to enforce his claim; each superior lord has six months from the expiry of his immediate inferior's right.]

Mortmain & Charitable Uses Act, 1888, s. 1.
A.-G. v. *Lewin* (1837) C. P. Cooper, 54.
Co. Litt. 46, b.; *Power* v. *Banks* [1901] 2 Ch. 487.

Acts of corporation

28. Subject to the exceptions mentioned below* and in § 124, a corporation aggregate (not being a company incorporated under the Companies Clauses Act, 1845, or the Companies Act, 1862) can only execute conveyances and enter into contracts through the medium of its common seal, duly affixed in accordance with its documents of incorporation. But every corporation is bound by the other acts of its

officials, servants, and agents, in accordance with the ordinary rules of agency.

*[The exceptions from the rule that a corporation aggregate can only execute conveyances and contracts through the medium of its common seal, are not very clear in principle. They appear to comprise: (1) cases of immediate necessity or trifling importance (*Wells* v. *Kingston-upon-Hull* (1875) L. R. 10 C. P. 402); (2) cases in which a trading corporation, incorporated for a particular purpose, is entering into an engagement in direct pursuance of that purpose (*South W. Colliery Co.* v. *Waddle* (1868) L. R. 3 C. P. 463, and 4 C. P. 617); (3) cases in which a corporation, having received the benefit of an executed contract, entered into in pursuance of its ordinary business, is sued on the contract (*Lawford* v. *Billericay R. D. Council* [1903] 1 K. B. 772.]

Mayor of Kidderminster v. *Hardwick* (1873) L. R. 9 Ex. 13.
Whitfield v. *S. E. Ry. Co.* (1858) El. Bl. & El. 115; *Cornford* v. *Carlton Bk. Ld.* [1899] 1 Q. B. 392. This is the case, even when express malice is a condition of liability (*Citizens' Life Assurance Co.* v. *Brown* [1904] A. C. 423).

Contracts with members

29. A member of a corporation aggregate can contract with the corporation in his individual capacity.

Hill v. *Manchester Waterworks Co.* (1833) 5 B. & Ad. 866.

Expulsion

30. Subject to the documents of incorporation, every corporation aggregate has power to amove its officers and members for reasonable cause. But a person whom it is proposed to amove must be allowed an opportunity of being heard in his own defence.

R. v. *Richardson* (1758) 1 Burr. 517.
R. v. *Saddler's Co.* (1863) 10 H. L. C. 404.

By-laws

31. Subject to the documents of incorporation, every corporation aggregate has power to make by-laws, which, until repealed, will bind the corporation, and the members of the corporation as such. But the corporation cannot, by its by-laws, affect persons who are not members of the corporation, unless expressly authorised by law to do so, or (possibly) unless there is an ancient custom to that effect.

[In all probability the only corporations which (apart from express statutory authority) can claim to affect strangers by their by-laws, are corporations having control of particular geographical areas. There are now very few such corporations which do not derive their powers directly from statute.]

Child v. *Hudson's Bay Co.* (1723) 2 P. W. 207. The existence of a by-law may be presumed after long usage. (*R.* v. *Ashwell* (1810) 12 East, 22.)
Hesketh v. *Braddock* (1766) 3 Burr. 1858.

Enacting body

32. Subject to the documents of incorporation, and to ancient custom, the power of making by-laws belongs to the whole body of the corporators.

R. v. *Westwood* (1830) 7 Bing. 1. (In that case it was held, that even an express power in a select body to make by-laws did not deprive the whole body of its inherent rights.)

Dissolution

33. A corporation is dissolved by Act of Parliament (any corporation), by the death of all its members or of all the members of an essential part of it (corporations aggregate), by surrender duly enrolled, by judgment of revocation on a writ of *scire facias*

(any corporation created merely by Letters Patent or Charter), by order of the Court or other statutory formality (companies incorporated under or governed by the Companies Acts, 1862–1900).

R. v. *Pasmore* (1789) 3 T. R. 199.
R. v. *Osbourne* (1803) 4 East, 335.
Eastern Archipelago Co. v. *The Queen* (1853) 2 C. L. R. 145.
Companies Act, 1862, ss. 111, 143; Companies Act, 1880, s. 7.

Loss of capacity

34. A corporation which is subject to the provisions of the Companies Acts, 1862–1900, loses its legal capacity by the commencement of proceedings for winding up. But the liquidator of the corporation for the time being is entitled, subject to the provisions of the Acts, to administer the property and enforce the rights of the corporation.

[This category includes many corporations which were not originally incorporated under Companies Acts. (Companies Act, 1862, ss. 199–204; Industrial and Provident Societies Act, 1876, s. 17.)]

Re Wiltshire Iron Co., L. R., 3 Ch. App. 443.
Companies Act, 1862, s. 95.

Assets on dissolution

35. On the dissolution of a corporation, its frank-almoigne and socage estates revert to the donors or their heirs; its personal property vests in the Crown.

[The difference of opinion referred to in the Note below, is not of great practical importance. It is very unlikely that a corporation owning property would be dissolved before the property had been disposed of. In the case of modern corporations, such as trading companies, care is always taken to preserve the existence of the corporation until its affairs have been wound up. In the case of an

ancient corporation, the result of the practical difficulty of discovering the donor's heirs would be to give the property to the Crown. Presumably, the leasehold interests of such a corporation would also, as personalty, pass to the Crown.]

Blackstone, *Commentaries*, II, 256, founded on Co. Litt. 13 b. (But see Hargrave's & Butler's Note on the passage.) If a corporation holding property jointly is dissolved, its interests devolve, according to the usual rule, on the other joint tenants (Bodies Corporate (Joint Tenancy) Act, 1899).

Re Higginson & Dean (1899) 1 Q. B. 325. (It is doubtful whether the term "personal property" will here include choses-in-action.)

SECTION II

THINGS

36. The word "thing" is used in English Law to include (*a*) material objects, not being living human bodies, (*b*) rights or collections of rights, (*c*) acts, omissions, and forbearances. The sense in which the word is used is to be gathered from the context in each case. *Things*

37. "Things real" include (a) all interests in land held by frankalmoigne, socage, or copyhold tenure, (b) all chattels, such as heirlooms, which, unless alienated *inter vivos*, devolve along with interests in land on the death of their owner, (c) peerages, offices, franchises, dignities, and other public rights which are treated as property, (d) shares in certain companies owning interests in land. *Things real*

[Equivalent expressions are "realty," "real estate," "real property."]

Torre v. *Browne* (1855) 5 H. L. C. 571. The laxer rules of interpretation applied to the language of testaments allow the expression "real estate" and its equivalents to include leaseholds in certain cases (*Re Davison* (1888) 58 L. T. 304). But leaseholds are, properly speaking, "chattels real."

Drybutter v. *Bartholomew* (1723) 2 P. W. 127; *Buckeridge* v. *Ingram* (1795) 2 Ves. Jr. 652. Shares in a company governed by the Companies Clauses Act, 1845, or by the Companies Acts, 1862–1900, are personal estate, even though the company owns interests in land (Companies Clauses Act, 1845, s. 7; Companies Act, 1862, s. 22).

Things personal

38. "Things personal" include all "things" not comprised in "things real."

[Equivalent expressions are "personalty," "personal estate," "personal property."]

Corporeal hereditaments

39. "Corporeal hereditaments" include all interests in lands which confer the right to possession of the land on the person in whom they are vested, whether they are capable of passing to heirs by way of succession, or not.

[It must be remembered that a freehold estate which is subject only to a term of years is regarded as a corporeal hereditament. The possession of the termor does not destroy the seisin of the freeholder.]

Thus a life interest in land may be a corporeal hereditament (*Moore* v. *Denn* (1800) 2 B. & P. 247). Since the abolition of the necessity for livery of seisin, terms of years in possession have also been classed as corporeal hereditaments (*Tomkins* v. *Jones* (1889) 29 Q. B. D. 599). There is some doubt whether the term "hereditament" does not more properly apply to the subject matter of the interest, than to the interest itself (*Doe* v. *Allen* (1800) 8 T. R. 503). But it appears to be difficult to reconcile this view with the common practice of describing a right of pasture as an incorporeal hereditament.

Incorporeal hereditaments

40. "Incorporeal hereditaments" include all interests in land which do not of themselves confer the right to possession; and peerages, offices, franchises, dignities, and other public rights which are treated as property.

Chose-in-action

41. A "chose-in-action" means any right, vested in a definite person or persons, to obtain from another,

by legal proceedings, any money or money's worth, or any right in the nature of property, whether the aim of the proceedings be to get possession of a specific material object, or not.

[The scope of the phrase "chose-in-action" is at present unsettled. Certainly the phrase includes claims to specific material objects, rights to enforce the performance of contracts, stocks, shares, and negotiable instruments; probably also patents, copyrights, and trade marks; probably not claims to compensation in damages for torts. (See discussions by various writers of eminence, in *Law Quarterly Review*, Vols. IX–XI.)]

42. The term "land" includes, in addition to the soil itself, unworked minerals, surface and other water, trees and other vegetation actually growing in the soil, buildings affixed to the soil, and all articles affixed to the soil, or to any building itself affixed to the soil, in such a manner that they cannot be removed without perceptible disturbance of the soil or building ("Fixtures"). *Land*

[It is, unfortunately, the case that informal documents, *e. g.* home-made testaments and contracts, often employ the word "land" when they mean an interest in land. The precise scope of the word in such events has usually to be determined by the rest of the document or the circumstances of the case. But in a testament it may be governed by the Wills Act, 1837, s. 26, and, in an Act of Parliament passed after the year 1850, it is subject (unless the Act expressly provides otherwise) to s. 3 of the Interpretation Act, 1889.]

Mather v. *Fraser* (1856) 25 L. J. Ch. 360, frequently followed. Much of the difficulty connected with the law of fixtures is the result of a careless use of terms. An article may be a "fixture," even though a lessee may be entitled to remove it at the expiration of his lease.

Servitudes

43. Easements, profits, franchises, and other similar rights exercised by the owner or occupier of land, as such, are also included in the term "land," and pass on the conveyance of, or succession to, the interest of the owner or occupier, without express words.

Conveyancing Act, 1881, s. 6. It is doubtful if this rule applies to conveyances made before 1st January, 1882. (See *A.-G.* v. *Ewelme Hospital* (1853) 17 Beav. 385.)

Movables

44. The extent of the material object included in the description of a movable is a question of fact in each case. No easement, profit, franchise, or similar right can be annexed to or imposed upon the ownership or possession of a movable.

Bagot Pneumatic Tyre Co. v. *Clipper Pneumatic Tyre Co.* [1902] 1 Ch. 146. There is, however, some authority for saying that a movable may be so affected by a contract, that a purchaser who takes with notice of the contract may be restrained from using the movable in a manner inconsistent with the contract (*De Mattos* v. *Gibson* (1858) 4 De G. & J. 276).

Profits

45. The "profits" of a thing mean the pecuniary value which is or may be derived from the occupation, exercise, or enjoyment of the thing.

Dunn v. *Large* (1783) 3 Doug. 335; *Doe* v. *Harlow* (1840) 12 A. & E. 40; *Phillips* v. *Homfray* (1883) 24 Ch. D. 455.

Mesne profits

46. A person liable to pay "mesne profits," i. e., the profits of a thing accruing during his unlawful

occupation, may be ordered to pay, in addition to the value of the premises, the damage (if any) suffered by the lawful claimant by reason of the latter's dispossession; but he may deduct all sums paid by him which the lawful occupant could have been compelled to pay.

Goodtitle v. *Tombs* (1770) 3 Wils. 118; *Phillips* v. *Homfray, ubi sup.* *Doe* v. *Hare* (1833) 2 C. & M. 146; *Barker* v. *Brown* (1856) 1 C. B. N. S. 150.

SECTION III

LEGAL ACTS

TITLE I — LEGAL CAPACITY

Convicts and alien enemy

47. The following persons have no legal capacity, viz.:

(*a*) A person who is under judgment of death or penal servitude, or a proclamation of outlawry, recorded by a competent Court, upon a charge of treason or felony;

Forfeiture Act, 1870, ss. 6, 8. (Outlawry is not strictly confined to charges of treason or felony; but the point is of little practical importance.)

(*b*) An alien enemy, having no licence to trade with the subjects of the Crown.

Willison v. *Patterson* (1817) 7 Taunt. 439.
The rights of an alien enemy are only suspended, not destroyed, by the outbreak of hostilities; therefore it is probable that an alien enemy could acquire property by unilateral conveyance, *e.g.* a testament.

Property of convict

48. The property (including choses-in-action) which belongs to a convict at the time of his conviction, and all property (including choses-in-action) to which he becomes entitled during the continuance

of his sentence, vests in an administrator appointed by the Court, and is by him administered in accordance with the provisions of the Forfeiture Act, 1870.

[Under the old law, the personalty of a convict was forfeited to the Crown, his realty (except in the case of a traitor, whose realty was also forfeited to the Crown) to the next lord of the fee. The Act of 1870 is not retrospective; and the old law may possibly still apply in rare cases.]

Forfeiture Act, 1870, ss. 10, 12–18.

Minors

49. A testament made by a minor, and all contracts entered into by him for the repayment of money lent or to be lent, or for goods (not being necessaries) supplied or to be supplied, and all accounts stated with minors, are void.

Wills Act, 1837, s. 7. There is a possible exception in the case of soldiers on active service, and of sailors at sea (*In the Goods of Mc. Murdo* (1867) L. R. 1 P. & D. 540; *In the Goods of Hiscock* [1901] P. 78).
Infants Relief Act, 1874, s. 1.

Necessaries

50. A minor can enter into a binding contract, expressed or implied, to pay a reasonable price for goods and services, of a nature suitable to his condition in life, and actually required by him for his reasonable comfort ("Necessaries").

Chapple v. *Cooper* (1844) 13 M. & W. 252; *Walter* v. *Everard* [1891] 2 Q. B. 369; Sale of Goods Act, 1893, s. 2. There is authority for saying, that a contract of employment, which, in the opinion of the Court, is for the minor's benefit, is binding on him (*Clements* v. *L. N. W. Ry. Co.* [1894] 2 Q. B. 482).

Necessaries

51. Whether goods or services can possibly be classed as necessaries, is a question of law; whether they were actually required by the minor, is a question of fact in each case.

Ryder v. *Wombwell* (1868) L. R. 4 Ex. 32.

Voidable acts

52. A conveyance made by or to a minor (other than a conveyance by way of feoffment under a special custom), and a "continuing" contract entered into by him, are voidable at the option of the minor, up to a reasonable time after he attains his majority. What is a reasonable time is a question of fact in each case.

[The Courts are somewhat reluctant to compel a purchaser to take a title which depends upon a customary feoffment by an infant (*Maskell's and Goldfinch's Contract* [1895] 2 Ch. 525); but in the matter of "continuing" contracts the tendency is to give increased recognition to the capacity of the infant.]

Robinson, *Gavelkind*, 248, 277, &c.
Zouch v. *Parsons* (1765) 3 Burr. 1805; *Inman* v. *Inman* (1873) L. R. 15 Eq. 260; *Edwards* v. *Carter* [1893] A. C. 360; *Hamilton* v. *Vaughan-Sherrin Co.* [1894] 3 Ch. 589.

Continuing contracts

53. A "continuing" contract means a contract (such as a contract of tenancy, a contract of partnership, or a contract of service) out of which rights and liabilities arise from time to time after the making of the contract.

Money paid by minor

54. A minor cannot, in the absence of fraud by the other party, recover money paid by him under a void or voidable contract or conveyance, if he has received any benefit under it.

Valentini v. *Canali* (1889) 24 Q. B. D. 166; *Holmes* v. *Blogg* (1818) 2 Moo. 552; *Corpe* v. *Overton* (1833) 10 Bing. 252; *Hamilton* v. *Vaughan-Sherrin Co.*, *ubi sup.*

Subrogation

55. If money, borrowed by a minor for such purpose, has been actually expended by him in payment for necessaries, or in acquiring real property by a conveyance which he has not repudiated, the person lending the money will be entitled to stand in the place of the person to whom the money has actually been paid; but a negotiable instrument, given by a minor in payment for necessaries, is void.

[This doctrine, long ago adopted by Courts of Equity, but apparently allowed to fall into oblivion, has recently been revived in the Nottingham Building Society case, cited in the note below. It is part of the general principle of subrogation, by which a fund which has benefited by an operation, or a series of operations, is charged with liabilities properly incurred in conducting such operations. The doctrine does not extend to impose personal liability on the parties who have benefited.]

Earle v. *Peale* (1712) 1 Salk. 387; *Marlow* v. *Pitfield* (1719) 1 P. W. 558.
Thurstan v. *Nottingham Building Soc.* [1902] 1 Ch. 1.
Ex parte Margrett [1891] 1 Q. B. 413.

Marriage settlements of minors

56. A male minor at the age of twenty, and a female minor at the age of seventeen, may, on the

occasion of his or her marriage, and with the approval of the Court, make a binding settlement of property. But such settlement may not include an appointment under a power which (in the instrument creating it *) is expressly declared not to be exercisable by a minor; and every exercise of a power of appointment, and every disentailing assurance by any infant tenant-in-tail, comprised in such settlement, becomes absolutely void on the death of the minor before attaining majority.

*These words are not in the Act; but it is presumed that they are implied.

Infant Settlement Act, 1855; *Re Scott* [1891] 1 Ch. 298.

Ratification

57. No ratification, made after full age, by any person, of any contract made by him during minority, is enforceable, whether such ratification were given for new consideration, or not.

Infants Relief Act, 1874, s. 2.

Minor as agent

58. A minor may act as an agent; but he cannot incur any contractual liability in that capacity.

[The amount of authority is extremely small; but in *Watkins* v. *Vince* (1818) 2 Stark. 368, Lord Ellenborough allowed a man to be sued on a guarantee signed on his behalf by a youth of sixteen. It is said, by some writers, that a minor can appoint an agent to do any act which he himself could lawfully do; but the balance of opinion is against this view (*Thomas* v. *Roberts* (1847) 16 M. & W. 778). A minor married woman may, however, appoint an attorney by deed (Conveyancing Act, 1881, s. 40).]

Smally v. *Smally* (1700) 1 Eq. Ca. Ab. 6.

59. A minor can be appointed an executor, a guardian, or a trustee; but he cannot act in such capacities until he attains his majority. *Minor as executor*

In the Goods of Stewart (1875) L. R. 3 P. & D. 244.
In some cases a minor can himself appoint a guardian, either for himself or his children (12 Car. II. c. 24, s. 8; 2 Ves. Sr. 375).
Re Shelmerdine (1864) 33 L. J. Ch. 474.

60. A minor can act as a witness on all occasions, if he is old enough to understand the nature of the transaction. *Minor as witness*

R. v. *Brasier* (1779) 1 Leach C. L. 199.

61. A minor is civilly responsible for his tortious acts and omissions; but a claim really arising out of contract cannot be converted into a claim on tort, for the purpose of making a minor liable. *Torts of minor*

Jennings v. *Rundall* (1779) 8 T. R. 335; *Burnard* v. *Haggis* (1863) 14 C. B. N. S. 45.

62. A person cannot be adjudicated a bankrupt in respect of a debt contracted by him during his minority. *Minors and bankruptcy*

Ex parte Jones (1881) 18 Ch. D. 109. *Quære:* if the contract were for necessaries, or the claim founded on tort.

63. A child *en ventre sa mère* can acquire property by devise or succession, and a future interest can be *Unborn child*

limited to it by deed; but (probably) a present interest cannot be limited to it by deed.

Taylor v. *Bydall* (1677) Freeman K. B. 243.
Long v. *Blackall* (1797) 3 Ves. 466.
10 & 11 Will. III. (1699), c. 16, extended by interpretation to cover all cases of posthumous children (*Thellusson* v. *Woodford* (1799) 4 Ves. 322). The rule does not apply when the result of following it would be to deprive the unborn child of an interest (*Villar* v. *Gilbey* (1905) XXI Times L. R. 561).

Acts of Lunatics

64. The unilateral acts of a person of unsound mind are void, unless they are done during a lucid interval; his contractual acts (other than marriage), are valid, unless it can be proved, by the person seeking to avoid them, that the other party to the transaction was aware of the unsoundness of mind. In the latter case, they are voidable at the option of the person of unsound mind, or his representatives. A person of unsound mind is liable for torts committed by him, at least if they do not involve the formation of a specific intention.

Roe v. *Nix* [1893] P. 55 (testament); *Selby* v. *Jackson* (1843) 6 Beav. 192 (deed).
Imperial Loan Co. v. *Stone* [1892] 1 Q. B. 599.
Molton v. *Camroux* (1849) 4 Exch. 17.
Weaver v. *Ward* (1618) Hob. 134. But see the concluding remarks of Esher, M. R., in *Hanbury* v. *Hanbury* (1892) 8 Times L. R. at p. 560.

Lunacy

65. Whether a person is of unsound mind, for the purposes of a particular transaction, is a question of fact in each case.

[There is no "status" of lunacy for the purposes of legal capacity. A will may be valid, though it has been made by a person

found to be a lunatic by an inquisition which has not been superseded (*Roe* v. *Nix* [1893] P. 55)].

Jenkins v. *Morris* (1880) 14 Ch. D. 674.

Necessaries of lunatic

66. The property of a person of unsound mind is liable to pay a reasonable price for necessaries sold and delivered to him, even by persons who were aware of his unsoundness of mind.

Sale of Goods Act, 1893, s. 2.

Marriage of lunatic

67. The marriage of a person of unsound mind is (probably) void, even though the other party were unaware of the unsoundness of mind at the time when the marriage was contracted.

[This is, probably, the only case in which "general insanity" is recognised by English Law. In other cases, the question is whether the alleged unsoundness of mind affected the particular transaction. In other words, a man may be sane on some points, and insane on others.]

Durham v. *Durham* (1885) 10 P. D. 80; *Hunter* v. *Edney* (1881) *ibid.* 93; *Cannon* v. *Smalley* (1885) *ibid.* 96.

Partnership of lunatic

68. A contract of partnership may be dissolved by the Court, if one of the parties thereto becomes permanently of unsound mind, or is found lunatic by inquisition.

Partnership Act, 1890, s. 35 (a).

Drunkards

69. The contracts and conveyances of a drunken person stand on the same footing as those of a person of unsound mind.

Matthews v. *Baxter* (1873) 42 L. J. Ex. 73.

Bankrupts

70. An undischarged bankrupt may acquire property and enter into contracts; but his rights, not being rights arising from purely personal services or injuries to his person or character, may be claimed by his trustee at any time for the benefit of his creditors, except as against *bonâ fide* purchasers for value. Real property (other than advowsons, dignities, and offices) acquired by an undischarged bankrupt, passes to his trustee without express claim; but leaseholds do not pass unless claimed by the trustee, and *bonâ fide* purchasers for value from the bankrupt before the intervention of the trustee will be protected.

Re Graydon [1896] 1 Q. B. 417. Probably, as against the trustee, the bankrupt will only be able to retain so much of the proceeds of his earnings as will suffice for the maintenance of himself and his family.

Ex parte Vine (1878) 8 Ch. D. 364.

Mercer v. *Vans Colina* [1900] 1 Q. B. 130, n.; *Cohen* v. *Mitchell* (1890) 15 Q. B. D. 262.

New Land Development Association and Gray [1892] 2 Ch. 138.

Clayton's & Barclay's Contract [1895] 1 Ch. 214.

Married women

71. A married woman is now, as regards the acquisition and disposal of property, and the acquisition

of rights and liabilities in contract and in tort, in the same position as a single woman,

Married Women's Property Act, 1882, s. 1 ; 1893, s. 1.

except that: —

(*a*) A married woman cannot be rendered personally liable in respect of contract, or of fraud committed in connection with contract. Such liabilities can only be enforced against her property;

Fairhurst v. *Liverpool Adelphi* (1854) 23 L. J. Exch. 163 ; *Re Lynes* (1893) 2 Q. B. 113. The liability of a married woman in respect of pure tort seems to be somewhat doubtful. (See Married Women's Property Act, 1882, s. 1 (2), and *Earle* v. *Kingscote* [1900] 2 Ch. 594.) Of course her property is liable.

(*b*) She cannot be made a bankrupt, unless she is carrying on trade apart from her husband, or (possibly) unless she has obtained a judicial separation or an order of protection, or unless her husband is *civiliter mortuus;*

Married Women's Property Act, 1882, s. 1 (6).
Matrimonial Causes Act, 1857, ss. 21, 25–6.
Ex parte Franks (1831) 7 Bing. 762.

(*c*) She may be restrained from anticipating her income, in manner stated in §§ 105–108 ;

(*d*) She cannot act as "next friend" or guardian *ad litem ;*

Re Duke of Somerset (1887) 34 Ch. D. 465.

(*e*) She may be required to obtain the concurrence of her husband, and to exercise certain special

formalities, in the disposal of property of which she is a trustee.

Harkness' & Allsopp's Contract [1896] 2 Ch. 358. But the exception does not apply to a married woman who is a "bare trustee" (Trustee Act, 1893, s. 16), or a mortgagee (*Brooke's and Fremlin's Contract* [1898] 1 Ch. 647).

Aliens and British ships

72. No alien (not being a denizen) can acquire or hold a share in a British ship; nor can a natural-born British subject who has acquired a foreign nationality, and subsequently re-acquired British nationality, nor any naturalized foreigner, or denizen, unless he has, since his repatriation, naturalization, or denization, taken the oath of allegiance, and is either a resident within British dominions, or a partner in a firm actually carrying on business therein.

Merchant Shipping Act, 1894, s. 1.

Aliens and estates tail

73. No alien can be appointed "protector of a settlement" of land in England.

[A "protector of a settlement" is a person whose consent is required to enable the owner of an estate tail in remainder, created by the same settlement, to bar the entail completely. Such a person may be either (*a*) the owner of the first life estate in the premises under the same settlement, or (*b*) a person specially appointed by the settlor to act as "protector."]

Fines and Recoveries Act, 1833, s. 32. *Quære,* as to the effect of the first life estate under the settlement being vested in an alien, and there being no special appointment of protector.

Aliens and land

74. Subject to the provisions of the Crown Suits Acts, 1769 and 1861 (§ 171), no alien, nor any person claiming through an alien, can make a title to any interest in land by virtue of a disposition made before 12th May, 1870, or by virtue of a succession occurring on the death of any person who died before that date.

Collingwood v. *Pace* (1661) 1 Levinz, 59; Naturalization Act, 1870, s. 2 (3); *Sharp* v. *St. Sauveur* (1871) L. R. 7 Ch. App. 343.

TITLE II—DECLARATION OF INTENTION

Mode of declaration

75. Subject to special rules of law, and to agreement between the parties, intention may be declared by conduct, words, writing, signs, or any other means.

E.g. there are various statutes which require transactions to be evidenced by writing, deed, attestation of witnesses, &c. These will be noted in the clauses which deal with the transactions in question.

Nature of intention

76. Subject to the various rules affecting the construction of written documents, the nature of the intention declared by any such means is a question of fact in each case.

Ostensible intention

77. If a person uses means of declaration which, in the circumstances, would reasonably be taken to indicate a particular intention, he cannot be allowed to deny the existence of such intention as against any party who has, in good faith, acted upon it.

Pickard v. *Sears* (1837) 6 A. & E. 469; *Jones* v. *Littledale* (1837) *ibid.* 486.

78. It is not necessary that the declaration of intention should be made directly to the party acting

upon it; but it is (probably) necessary, that it should be made with the apparent object of being acted upon by persons in the position of the party seeking to obtain the benefit of it.

Henderson v. *Williams* [1895] 1 Q. B. 521.
Johnson v. *Crédit Lyonnais* (1877) C. P. D. 32.

Real intention

79. An act or document which purports to be of a certain character, but which was really intended by the parties to it to be of a different character, must be treated as of its real, and not as of its apparent character.

[The amount of authority for this proposition is small, except in the instance of mortgages; but it is conceived that the proposition is sound. There is, as a rule, no object in concealing the true nature of a transaction, except a desire to evade the law. Presumably, however, the rights of innocent purchasers for value who rely on the ostensible transaction will be protected.]

Benyon v. *Nettlefield* (1850) 3 Mac. & G. 94; *Sprye* v. *Porter* (1856) 7 E. & B. 78; *Salt* v. *Marquess of Northampton* [1892] A. C. 1.

Mere enticements

80. A declaration of intention, not meant to produce legal consequences, cannot be enforced by any person, who, when he acted upon it, was aware of its real character.

Weeks v. *Tibold* (1605) 1 Rolle Ab. 6; *Guthing* v. *Lynn* (1831) 2 B. & Ad. 232.

Fraud

81. If a person has been induced by the fraud, duress, threats, or undue influence of another to form and declare a particular intention, he (or, if he be dead, his representatives) will be entitled, as against the guilty party, and all other persons who, at the time when they acted upon the intention, knew, or ought to have known, of the fraud, duress, threats, or undue influence, and against "volunteers," to revoke his intention. But he will not be entitled to do so to the detriment of persons who have, in good faith and for valuable consideration, acted upon it.

Morley v. *Loughnan* [1893] 1 Ch. 736.
Scholefield v. *Templer* (1859) 4 De G. & J. 433.
Lyon v. *Home* (1868) L. R. 6 Eq. 655; *Barron* v. *Willis* [1900] 2 Ch. 133. A person who takes by a voluntary gift from a purchaser for value is not a "volunteer."
Cobbett v. *Brock* (1855) 20 Beav. 524; *Oakes* v. *Turquand* (1867) L. R. 2 H. L. C. 325; *Bainbrigge* v. *Brown* (1881) 18 Ch. D. 188.

Laches

82. The person seeking to revoke his intention on one of the grounds mentioned in § 81, must do so within a reasonable time after the discovery of the fraud, or the cessation of the duress, threats, or undue influence, and before the circumstances have so changed, by his own act or default, that the other party cannot be remitted to his former position. What is a reasonable time is a question of fact in each case.

Mitchell v. *Homfray* (1881) 8 Q. B. D. 587; *Allcard* v. *Skinner* (1887) 36 Ch. D. 145.
Rees v. *de Bernardy* [1896] 2 Ch. 446. (It does not appear to be

quite certain, that the change of circumstances must be due to the person seeking to avoid the transaction.)

Urquhart v. *Macpherson* (1878) L. R. 3 App. Ca. 831. (But the mere fact of the deterioration of the subject-matter will not prevent the rescission of a sale (*Adam* v. *Newbigging* (1888) L. R. 13 App. Ca. 308.)

Confirmation

83. If any person, having a right to avoid a transaction on one of the grounds mentioned in § 81, and, being aware of and reasonably capable of enforcing such right, manifests an intention to confirm the transaction, he cannot afterwards avoid it.

Wright v. *Vanderplank* (1855) 2 K. & J. 1; *Jarratt* v. *Aldam* (1870) L. R. 9 Eq. 463.

Presumption of influence

84. Undue influence will be presumed in transactions *inter vivos* between trustee and beneficiary, parent and unemancipated child, guardian and former ward, legal adviser and client, medical adviser and patient, spiritual adviser and penitent, and between any other persons standing towards one another in a relationship implying special confidence. In such cases, the person seeking to affirm the transaction must prove its fairness. In other cases (except those mentioned in § 86), the person alleging the existence of undue influence must prove it.

[The rule has no application to testaments. *Parfitt* v. *Lawless* (1876) 2 P. & D. 462).]

Coles v. *Trecothick* (1804) 19 Ves. 234.

Savery v. *King* (1856) 5 H. L. C. 655.

Hylton v. *Hylton* (1754) 2 Ves. Sr. 547; *Hatch* v. *Hatch* (1804) 9 Ves. 292. If the relationship of guardian and ward actually exists at

the time of the transaction, the presumption against the guardian is, of course, even stronger.

Holman v. *Loynes* (1854) 4 De G. M. & G. 270; *Broun* v. *Kennedy* (1863) 33 L. J. N. S. Ch. 71 and 342; *Liles* v. *Terry* [1895] 2 Q. B. 679. A voluntary gift *inter vivos* made by a client to his legal adviser cannot be supported, even though undue influence be disproved (*Rhodes* v. *Bate* (1865) L. R. 1 Ch. App. 252). But this latter rule does not apply to gifts by will (*Raworth* v. *Marriott* (1833) 1 Myl. & K. 643).

Billage v. *Southee* (1852) 9 Ha. 534.

Huguenin v. *Bazeley* (1807) 14 Ves. 273; *Middleton* v. *Sherburne* (1841) 4 Yo. and C. 358.

Billage v. *Southee, ubi sup.*, at p. 540; *Smith* v. *Kay* (1859) 7 H. L. C. 771.

Cases where no presumption

85. The relationships of husband and wife, tenant-for-life and remainderman, and mortgagee and mortgagor, do not raise a presumption of undue influence for the purposes of § 84.

Barron v. *Willis* [1899] 2 Ch. 578. (The decision on this point was not affected by the appeal.)

Wilson v. *Sewell* (1766) 4 Burr. 1979.

Bevan v. *Habgood* (1860) 1 J. & H. 222.

Persons below normal standard

86. The *onus* of proving the fairness of the transaction rests also upon all persons, whether standing in a confidential relation or not, who deal with expectant heirs, illiterate and ignorant persons, persons under manifest pecuniary or moral distress, and (probably) with any other persons who, to the knowledge of the person seeking to confirm the transaction, were at a disadvantage in relation to it.

Earl of Aylesford v. *Morris* (1873) L. R. 7 Ch. App. 484; *Brenchley* v. *Higgins* (1901) 70 L. J. Ch. 788. The Sales of Reversions Act, 1867, has not altered the law in this respect.

Fry v. *Lane* (1888) 40 Ch. D. 312.
Williams v. *Bayley* (1866) L. R. 1 H. L. C. 200; *James* v. *Kerr* (1889) 40 Ch. D. 449.

Mistake of fact

87. A *bonâ fide* mistake of fact, made without negligence, by one party to a transaction, as to the nature of the transaction, or the identity of the other party, or the existence or identity of the subject matter, renders the transaction void. And a *common* mistake as to the extent of the transaction, or the rights of the parties, will enable any one of the parties to avoid the transaction, unless the other will consent to execute it in such a manner as to carry out his real intention.

Thoroughgood's Case (1584) 2 Rep. 9 a; *Foster* v. *Mackinnon* (1869) L. R. 4 C. P. 704; *Lewis* v. *Clay* (1898) 67 L. J. Q. B. 224.
Boulton v. *Jones* (1857) 2 H. & N. 564; *Cundy* v. *Lindsay* (1878) L. R. 3 App. Ca. 459.
Hitchcock v. *Giddings* (1817) 4 Price, 135; *Couturier* v. *Hastie* (1856) 5 H. L. C. 673; *Raffles* v. *Wichelhaus* (1864) 2 H. & C. 906.
Calverley v. *Williams* (1790) 1 Ves. Jr. 210; *Cochrane* v. *Willis* (1865) L. R. 1 Ch. App. 58.
Cooper v. *Phibbs* (1867) L. R. 2 H. L. C. 149; *Earl Beauchamp* v. *Winn* (1873) L. R. 6 H. L. C. 223.

Inoperative mistake

88. A *bonâ fide* mistake of fact by one of the parties to a transaction, not being of the kind mentioned in § 87, and not being induced by the fraud or misrepresentation of the other parties, will not entitle the mistaken party to avoid the transaction. But, if it would be unreasonable of the other parties

to insist upon fulfilment of the transaction, the Court will not decree specific performance.

Scott v. *Littledale* (1858) 8 El. & Bl. 815; *Tamplin* v. *James* (1879) 15 Ch. D. 215; *Goddard* v. *Jeffreys* (1881) 51 L. J. Ch. 57; *May* v. *Platt* [1900] 1 Ch. 616.

Leslie v. *Tompson* (1851) 9 Ha. 268; *Webster* v. *Cecil* (1861) 30 Beav. 62.

Misrepresentation

89. A *bonâ fide* mistake of fact, not being a mistake of the kind mentioned in §§ 87 and 88, induced by the innocent misrepresentation of the other party, will not entitle the person making the mistake to avoid the transaction, unless (*a*) the misrepresentation was treated by the parties as a condition of the transaction; or unless (*b*) the transaction was a sale of an interest in land, or a sale to a company by its promoters, or a contract of insurance, or a transaction between partners or intending partners, or between agent (or former agent) and principal ("contracts *uberrimae fidei*"), or unless (*c*) the transaction was a voluntary gift.

[A "condition of the transaction," in this case, means a representation but for his belief in which the other party would not have entered into the transaction.]

Bannerman v. *White* (1861) 10 C. B. N. S. 844; *Behn* v. *Burness* (1863) 3 B. & S. 751.

Flight v. *Booth* (1834) 1 Bing. N. C. 370. Even here, when the misrepresentation is slight, the mistaken party may be compelled to carry out the transaction with a compensation for his mistake (*Dyer* v. *Hargrave* (1805) 10 Ves. 505; *Fawcett's & Holmes' Contract* (1899) 42 Ch. D. 587).

Reese River Silver Mining Co. v. *Smith* (1869) L. R. 4 H. L. C. 64.

Ionides v. *Pender* (1874) L. R. 9 Q. B. 531 (marine); *London Assur-*

ance Co. v. *Mansel* (1879) 11 Ch. D. 363 (life); *Bufe* v. *Turner* (1815) 6 Taunt. 338 (fire).

Fawcett v. *Whitehouse* (1829) 1 R. & M. 132; *Blisset* v. *Daniel* (1853) 10 Ha. 493.

McPherson v. *Watt* (1877) L. R. 3 App. Ca. 254.

Re Glubb [1900] 1 Ch. 354.

Non-disclosure

90. Mere non-disclosure of facts does not amount to misrepresentation, unless it occurs in one of the transactions specified in clause (*b*) of § 89.

[It may be regarded as very doubtful whether the ordinary vendor of an interest in land is bound to disclose any facts beyond those affecting his title (*Fox* v. *Mackreth* (1788) 2 Cox, 321; *Walters* v. *Morgan* (1861) 3 D. F. & J. 718). But there are *dicta* to the contrary. As to sales by promoters, see *Central Ry. Co. of Venezuela* v. *Kisch* (1867) L. R. 2 H. L. C. 99; *Erlanger* v. *New Sombrero Phosphate Co.* (1878) L. R. 3 App. Ca. 1218; as to the other transactions, see the cases quoted under § 89.]

Money paid by mistake

91. Money paid under a mistaken belief, arising from a misapprehension of fact, that it is due, can be recovered; unless it was paid under pressure of legal proceedings, *bonâ fide* exerted.

Barber v. *Brown* (1856) 1 C. B. N. S. 121.

Marriott v. *Hampton* (1797) 7 T. R. 269.

Cadaval v. *Collins* (1836) 4 A. & E. 858; *Ward* v. *Wallis* [1900] 1 Q. B. 675.

Maintenan

92. No transaction, having for its object the support and assistance by one party of another in the conduct of litigation, will be enforced by the Court, unless the party rendering, or agreeing to render, the

assistance, has an interest in the subject-matter of the litigation, or unless he is the parent, child, master, husband, guardian, or other natural protector of the litigant, or unless he has acted from motives of charity ("Maintenance" and "Champerty").

["Champerty" is the aggravated form of "Maintenance," in which the party agreeing to render the assistance stipulates for a share in the proceeds of the litigation (*Rees* v. *de Bernardy* [1896] 2 Ch. 437).]

Shackell v. *Rosier* (1836) 2 Bing. N. C. 634.
Guy v. *Churchill* (1888) 40 Ch. D. 481.
2 Inst. 564; Bacon Ab. "Maintenance" (b).
Harris v. *Brisco* (1886) 17 Q. B. D. 504.

Sale of evidence

93. A transaction whereby one party supplies, or stipulates to supply, information intended to lead to recovery of property by the other, in return for a promise of a share of the property when recovered, is not, on that account alone, unenforceable.

[The point is, that a mere sale of evidence, not involving or contemplating any legal proceedings, or any assistance by the vendor in the conduct of proceedings, is *per se* lawful. But the Court must be satisfied that the transaction is, actually as well as nominally, of that character.]

Sprye v. *Porter* (1856) 7 El. & Bl. 78.

Purchase by solicitor

94. The purchase, or agreement to purchase, by a solicitor, of the subject-matter of any litigation, of which he has, or has had, the conduct, is unenforceable.

Wood v. *Downes* (1811) 18 Ves. 120; *Simpson* v. *Lamb* (1857) 7 El. & Bl. 84; *Davis* v. *Freethy* (1890) 24 Q. B. D. 519.

Illegal object

95. No transaction having for its object the performance of an illegal or immoral act, or an act deemed to be contrary to public policy, will be enforced by the Court. But if the parties did not intend to violate the law, and the transaction can be carried out in a legal manner, it will be enforced, even though it originally contemplated the performance of acts which, unknown to the parties, were illegal.

Collins v. *Blantern* (1767) 2 Wils. 341; *Keir* v. *Leeman* (1844) 6 Q. B. 308; *Willyams* v. *Bullmore* (1863) 33 L. J. Ch. 461; *Scott* v. *Brown* [1892] 2 Q. B. 724. It is doubtful if the Court will take away property which has actually been transferred in pursuance of an immoral object which has been accomplished (*Ayerst* v. *Jenkins* (1873) L. R. 16 Eq. 275). But see *Phillips* v. *Probyn* [1899] 1 Ch. 811.

Waugh v. *Morris* (1873) L. R. 8 Q. B. 202; *Cargo ex Argos* (1873) L. R. 5 P. C. 155.

Immoral object

96. For the purposes of § 95, a transaction is regarded as having an object immoral or contrary to public policy, if it contemplates: (*a*) irregular sexual connection, (*b*) prospective dissolution of marriage, (*c*) the procurement of marriage in return for reward, (*d*) complete or undue restriction on marriage, (*e*) unreasonable restraint of trade, (*f*) deception of the public in matters of trade, (*g*) concealment of disgraceful misconduct, (*h*) evasion of duties imposed by law, (*i*) purchase or sale of a public office, (*k*) procurement or resignation of public office, (*l*) defeat or delay of creditors, (*m*) stifling of prosecution for a public offence.

Willyams v. *Bullmore* (1863) 33 L. J. Ch. 461.
Westmeath v. *Salisbury* (1831) 5 Bligh, N. S. 340.
Keat v. *Allen* (1707) 2 Vern. 588; *Hermann* v. *Charlesworth* (1905) 118 L. T. 502.
Bellairs v. *Bellairs* (1874) L. R. 18 Eq. 510. But a gift of real estate, accompanied by a restriction against marriage with a particular class of persons, is good (*Jenner* v. *Turner* (1880) 16 Ch. D. 188). And a gift of any property with a restriction on *remarriage* is also good (*Allen* v. *Jackson* (1875) 1 Ch. D. 399).
Davies v. *Davies* (1887) 36 Ch. D. 359; *Maxim Nordenfelt Case* [1894] A. C. 535.
Scott v. *Brown* [1892] 2 Q. B. 724.
Brown v. *Brice* (1875) 1 Ex. D. 5.
Humphreys v. *Polak* [1901] 2 K. B. 385; *Janson* v. *Driefontein Mines* [1902] A. C. 484.
Haneington v. *Du Chatel* (1781) 1 Bro. C. C. 124; *Hartwell* v. *Hartwell* (1799) 4 Ves. 811.
Morris v. *MacCulloch* (1763) 2 Ed. 190.
13 Eliz. (1571) c. 5; Bankruptcy Act, 1883, ss. 47, 48.
Windhill L. B. v. *Vint* (1890) 45 Ch. D. 351; *Jones* v. *Merioneth Building Soc.* [1892] 1 Ch. 173.

Reward of illegality

97. A gift or promise, made in return for past illegal or immoral conduct, stands on the same footing as any other voluntary gift or promise.

Hall v. *Palmer* (1844) 3 Ha. 532; *Beaumont* v. *Reeve* (1846) 8 Q. B. 483.

Transactions partly illegal

98. When, in return for a lawful consideration (or, in the case of contracts under seal, for no consideration), several distinct promises, some of which contemplate an illegal or immoral object, and others do not, are made, the promises which do not contemplate an illegal or immoral object can be enforced.

Pigot's Case (1614) 11 Rep. 27; *Bank of Australasia* v. *Breillat* (1847) 6 Moo. P. C. 201.

99. Property transferred in contemplation of an illegal or immoral object can be recovered at any time before a material part of the illegal or immoral object has been accomplished; and, in the case of a claimant *in minori delicto*, even after the illegal or immoral object has been accomplished. *Restitution*

Taylor v. *Bowers* (1876) 1 Q. B. D, 300; *Wilson* v. *Strugnell* (1881) 7 Q. B. D. 548; *Kearley* v. *Thomson* (1890) 24 Q. B. D. 742.
Atkinson v. *Denby* (1860) 6 H. & N. 778; *Hermann* v. *Charlesworth* (1905) 118 L. T. 502.

100. Any absolute prohibition of alienation attached to a transfer or creation of an estate in fee simple or fee tail, or to the ownership of personal property (other than leasehold interests), is void. *Restraint on alienation*

Bradley v. *Peixoto* (1797) 3 Ves. 324; *Corbett* v. *Corbett* (1888) 14 P. D. 7; *Dugdale* v. *Dugdale* (1888) 38 Ch. D. 176.

101. A provision in a similar transaction for the divesting of the acquirer's interest in the event of his bankruptcy, is also void. *Forfeiture on bankruptcy*

Re Machu (1882) 21 Ch. D. 838.

102 A provision for the termination of a life estate, or a leasehold interest, on alienation or bankruptcy, is valid, if it does not transgress the Rule against Perpetuities. *Termination on alienation*

Baker v. *Newton* (1839) 2 Beav. 112; *Power* v. *Hayne* (1869) L. R. 8 Eq. 262; *Blackman* v. *Fysh* [1892] 3 Ch. 209. This and the two

following §§ refer only to beneficial alienation, and do not apply to the fiduciary powers of alienation and management conferred upon limited owners by the Settled Land Acts and similar statutes. Any attempt to restrict the exercise of these powers is usually void. (See *e. g.* Settled Land Act, 1882, ss. 51, 52.)

Limitation until alienation

103. A limitation of a life interest *until* alienation or bankruptcy (not being a limitation by a person of an interest in his own property until his own bankruptcy) is valid. It is doubtful whether a limitation of a fee until alienation or bankruptcy would now be held valid.

Ex parte Stephens (1876) 3 Ch. D. 807. But a limitation by a man of his own property, to go over on alienation, cannot be defeated by a single creditor (*Detmold* v. *Detmold* (1889) 40 Ch. D. 585).

Brandon v. *Robinson* (1811) 18 Ves. 429; approved in *Dugdale* v. *Dugdale* (1888) 38 Ch. D. 180; *Dean* v. *Dean* [1891] 3 Ch. 155.

Re Machu (1882) 21 Ch. D. 842; *Dugdale* v. *Dugdale*, *ubi sup.*

Partial restraints

104. A qualified restriction against alienation is valid, if it does not transgress the Rule against Perpetuities.

Re Macleay (1875) L. R. 20 Eq. 188. This decision has, however, been very severely criticised by Pearson, J., in *Rosher* v. *Rosher* (1884) 26 Ch. D. 801. The result of the two decisions appears to be, that the restriction may take the form of prohibiting alienation beyond the limits of a particular class, but not of prohibiting alienation altogether for a limited time. A conveyance of an estate in land for charitable purposes may (probably) provide that, if the estate is not employed for the charitable purpose, it shall revert to the donor or his heirs (*Hollis' Hospital Case* [1899] 2 Ch. 540).

Restraint on anticipation

105. A conveyance for the benefit of a married woman may provide that she shall, during the existence of her marriage, have no power to alienate the *corpus*, or anticipate the income, of the property; and such a provision will (subject to §§ 107 and 108) prevent all alienation, direct or indirect, by the married woman.

Hood-Barrs v. *Cathcart* [1894] 2 Q. B. 559. (The decision on this point is not affected by the appeal in *Hood-Barrs* v. *Heriot* [1896] A. C. 174.)

Tullett v. *Armstrong* (1838) 1 Beav. 1. It is not necessary that the woman should be married when the gift takes effect; but the restraint will not operate until marriage.

Revival on re-marriage

106. Such a provision will cease to operate on the termination of the marriage; but, if suitably worded, it will revive, unless the property has in the meantime been alienated, on any subsequent marriage.

Hawkes v. *Hubback* (1870) L. R. 11 Eq. 5; *Shafto* v. *Butler* (1871) 40 L. J. Ch. 308.

Setting aside restraint

107. The restraint on anticipation may, with the consent of the married woman, be set aside by the Court, to such an extent as is necessary to bind her interest in a transaction which the Court deems to be for her benefit.

Conveyancing Act, 1881, s. 39; *Re Miller's Settlement* [1891] 3 Ch. 547.

Liability for costs and indemnity

108. Notwithstanding any restraint on anticipation, the Court may order the costs incurred by the opposite party, in litigation initiated by or on behalf of a married woman, to be paid out of her property; and may also hold her property liable to indemnify a trustee who, at her instigation, or with her consent in writing, has committed a breach of trust in respect of the estate of which the property in question forms part.

Married Women's Property Act, 1893, s. 2; *Hood-Barrs* v. *Heriot* [1897] A. C. 177.
Trustee Act, 1893, s. 45.

TITLE III — CONDITIONS

109. A condition is a term in a contract or conveyance, to the effect that on the occurrence, or non-occurrence of an uncertain event, act, or forbearance, a right shall arise, or cease to exist. *Condition*

Co. Litt. 201 a.

110. A condition, on the occurrence of which a right is to arise, is called a "condition precedent" (or "suspensive"); a condition, on the occurrence of which a right is to cease to exist, is called a "condition subsequent" (or "resolutive"). *Conditions precedent and subsequent*

Richards v. *Hayward* (1841) 2 Man. & G. 574.

111. Whether a term in a contract is a condition, or a mere independent agreement ("warranty") is a question of construction in each case. *Conditions and warranty*

Roberts v. *Brett* (1865) 11 H. L. C. 337.

112. When the vesting of a right is dependent upon the fulfilment of a condition precedent, the *Fulfilment of condition*

right does not vest until the condition has been completely fulfilled.

Mason v. *Harvey* (1853) 8 Exch. 819.

Fulfilment prevented

113. When the fulfilment of a condition has been prevented by one of the parties to a contract or conveyance, that party cannot take advantage of its non-fulfilment.

Mackay v. *Dick* (1881) L. R. 6 App. Ca. 251.

Invalid conditions

114. A conveyance of property, subject to a condition subsequent which is impossible at the time of making it, or which afterwards becomes impossible by the "act of God," or which is illegal or immoral, is or becomes absolute, and an obligation defeasible on the happening of a condition impossible at the time of making it, is absolute; but an obligation defeasible on the happening of an illegal or immoral condition, or a condition which afterwards becomes impossible or illegal, is or becomes void.

Co. Litt. 206; *Browning* v. *Beston* (1556) Plowd. 131.
Ibid.; *Keat* v. *Allen* (1707) 2 Vern. 588. If there are alternative conditions, and one become impossible, the obligation is also void (*Laughter's case* (1595) 5 Rep. 21b).

Time

115. Stipulations as to time are not construed as conditions,

Seton v. *Slade* (1802) 7 Ves. 265; Judicature Act, 1873, s. 25 (7).

except where:—

(*a*) The parties have expressly agreed that time shall be of the essence of the contract;

Hipwell v. *Knight* (1835) 1 Yo. & C. (Eq. Ex.) 415; *Oakden* v. *Pike* (1865) 34 L. J. Ch. 620. (Such a stipulation may, however, be waived by mere acquiescence.)

(*b*) There is a presumption, from the nature of the transaction, that such an agreement was intended.

Reuter v. *Sale* (1879) 4 C. P. D. 239 (mercantile contracts); *Withey* v. *Cottle* (1823) Turn. & R. 78 (life annuity); *Day* v. *Luke* (1868) L. R. 5 Eq. 336; *Patrick* v. *Milner* (1877) 2 C. P. D. 342.

But an unreasonable delay in the fulfilment of a stipulation as to time will entitle the promisee, even though such stipulation is not of the essence of the contract, to treat the transaction as at an end.

[In order to entitle the party seeking to rescind the transaction to take advantage of this rule, he must have given to the party in default a notice requiring him to fulfil his obligation within a reasonable time, which notice has not been complied with (*Hatten* v. *Russell* (1888) 38 Ch. D. at p. 347; *Compton* v. *Bagley* [1892] 1 Ch. 313).]

116. A condition as to time will not prevent the redemption of a mortgage; but it may, if not unreasonable, delay it. *Mortgages*

[This is one of the many rules adopted by the Court of Chancery in support of its fundamental maxim: "Once a mortgage, always a mortgage." It could be wished that the limits of "reasonableness" in this connection were a little more clearly defined.]

Salt v. *Marquess of Northampton* [1892] A. C. 1.

Talbot v. *Braddill* (1683) 1 Vern. 183, 394; *Lawless* v. *Mansfield* (1841) 1 Dr. & W. at p. 598; *Teevan* v. *Smith* (1882) 20 Ch. D. at p. 729; *Biggs* v. *Hoddinott* [1898] 2 Ch. 311.

Penalty

117. A penalty imposed upon breach of a condition will not be enforced; but a liability, intended merely to compensate the other party for loss occasioned by the default of the person subject to the condition, is valid. Whether a liability is in the nature of a penalty, or not, is a question of fact in each case.

Re Dagenham Dock Co. (1873) L. R. 8 Ch. App. 1022; *Mercer* v. *Irving* (1858) El. Bl. & El. 563; *Strickland* v. *Williams* [1899] 1 Q. B. 382.

Forfeiture of leases

118. The enforcement of a condition of re-entry for non-performance of the stipulations in a lease is subject to special restrictions.

[These restrictions will be set out in Book III.]

Conveyancing Act, 1881, s. 14; Conveyancing Act, 1892, ss. 2–5.

Bonds

119. On an ordinary money bond, the creditor can recover nothing beyond principal, interest, and costs.

4 Anne (1705) c. 16, ss. 13, 14.

Intervening acts

120. When an interest in land is forfeited by the fulfilment of a condition subsequent, all the acts of the person forfeiting the interest, and his predecessors in title, affecting the land, or his or their interest

therein, are void as against the person enforcing the forfeiture.

[This again is one of those elementary rules of law for which it is hard to find an express authority. But, if it did not exist, every condition subsequent could be evaded in the simplest manner.]

Perkins, *Profitable Book*, s. 840; Sheppard, *Touchstone*, 121. (This rule does not always apply to "conditions in law," *i. e.* conditions imposed by law, independently of the agreement of the parties. But such conditions are now very rare.)

TITLE IV—AGENCY AND REPRESENTATION

Agent

121. An "agent" is a person who has authority, express or implied, to act on behalf of another person (the "principal"), and to bind that other person by his acts and defaults.

Capacity

122. Any person of sound mind, notwithstanding any legal incapacity, may act as an agent; but his own rights and liabilities, in respect of both his principal and third parties, will be determined by his legal capacity.

Smally v. *Smally* (1700) 1 Eq. Ca. Ab. 6.

Effects of relationship

123. The legal relations of principal and agent, *inter se*, are governed by the Law of Contract (Book II, Part I) or Quasi-contract (Book II, Part III). The existence and extent of the agency, as regards third parties, are determined by the facts of each case, and the rules of law applicable thereto.

[It seems to be generally admitted, that the creation of the relationship of principal and agent must now always, by English Law, be referred to an agreement between the parties. But it may well be (*a*) that this agreement is not legally enforceable, and (*b*) that third parties are not bound by the terms of it.]

124. The relationship of principal and agent may be created by any conduct, from which the agreement of both principal and agent to adopt such relationship may be inferred; *Agency by conduct*

There must be consent of both parties. A person cannot be compelled to appoint an agent (*The Halley* (1868) L. R. 2 P. C. at p. 201).

except that: —

(*a*) An agent appointed to execute a deed must (unless the deed is executed by him in the presence of the principal), be himself appointed by deed;

Berkeley v. *Hardy* (1826) 5 B. & C. 355; *R.* v. *Longnor* (1833) 4 B. & Ad. 647.

(*b*) An agent appointed by a corporation aggregate must (except where the appointment is made for the purpose of effecting the direct objects for which the corporation was created) be appointed under the common seal of the corporation.

Arnold v. *Mayor of Poole* (1842) 4 Man. & G. 860; *Henderson* v. *A. R. Mail Co.* (1855) 5 El. Bl. 409. But, as between the corporation and third parties, an agent may be appointed by mere conduct (*Faviell* v. *The Eastern Counties Ry. Co.* (1848) 2 Exch. 344).

125. The principal may agree to the relationship after the agent has commenced to act as such ("Ratification"). But a person who really or ostensibly acts on his own behalf cannot afterwards claim to have *Agency by ratification*

acted as an agent; nor can the subsequent adoption of his acts place the person professing to adopt them in the position of a principal.

[Probably, the legal analysis of the position is: that the agent offers to act as such, and, assuming his offer to be accepted, proceeds to act as agent. The intended principal may decline or omit to accept the offer; but, if he accepts it, his acceptance relates back to the date of the offer.]

Wilson v. *Turnman* (1843) 6 M. & G. 242; *Keighly & Co.* v. *Durant* [1903] A. C. 240.

Liability of principal

126. The extent of the liability of a principal for the acts and defaults of his agent is governed by the terms of the authority conferred, or deemed to have been conferred, by him upon the agent.

Authority known

127. When the terms of the authority actually conferred by the principal are known to the person dealing with the agent, such person can only make the principal liable for acts and defaults within the scope of such authority.

Re Arthur Average Association (1876) 34 L. T. 942.

Authority unknown

128. When the terms of such authority are not known to the person dealing with the agent, the liability of the principal depends upon whether the agent is a "general" or a "special" agent.

General and special agents

129. A "general agent" is an agent appointed to act as such: (*a*) in a course of dealing which comprises all the affairs of his principal, or all the affairs of his principal in a particular business or character, or (*b*) in the ordinary course of the agent's recognized trade or profession. A "special agent" is an agent appointed to do a particular act, not being in the course of his recognized trade or profession.

Liability for general agents

130. A person who employs a general agent is liable to third parties for all acts of the agent usual in, or apparently within the scope of, his employment, or authorized by the custom of the trade or profession, and for all his wrongful acts or defaults done or committed in the course of his employment, as well as for all acts and defaults expressly authorized or ratified by him.

Smith v. *McGuire* (1858) 3 H. & N. 554; *Edmunds* v. *Bushell* [1865] L. R. 1 Q. B. 97; *Watteau* v. *Fenwick* [1893] 1 Q. B. 346; *Shaw* v. *Port Phillip Co.* (1884) 13 Q. B. D. 103; *Edwards* v. *Midland Ry. Co.* (1880) 6 Q. B. D. 287; *Eastern Counties Ry. Co.* v. *Brown* (1851) 20 L. J. Exch., at p. 101.

Partners

131. A partner, a manager of a business, a factor (and probably a broker), and a shipmaster, are general agents of their partners or employers, for the purposes of § 130.

Partnership Act, 1890, s. 5.
Barwick v. *English Joint Stock Bank* (1867) L. R. 2 Ex. 259.

Drinkwater v. *Goodwin* (1775) 1 Cowp. 251.
East India Co. v. *Hensley* (1794) 1 Esp. 112; *Heyworth* v. *Knight* (1864) 17 C. B. N. S. 298.
Arthur v. *Barton* (1840) 6 M. & W. 138.

Wife

132. A wife living with her husband is (probably) a general agent of the husband, in respect of the daily management of the household, and may pledge her husband's credit for necessaries suitable to his position, and the manner in which the household is maintained; unless her husband has either (*a*) supplied her with sufficient necessaries, or money to purchase the same, or (*b*) expressly forbidden her to pledge his credit.

Phillipson v. *Hayter* (1870) L. R. 6 C. P. at p. 41; *Morel* v. *Earl of Westmoreland* [1903] 1 K. B. 64.
Debenham v. *Mellon* (1880) L. R. 6 App. Ca. 24.
Jolly v. *Rees* (1864) 5 C. B. N. S. 628.

Wife living apart

133. A wife living apart from her husband, either with his consent, or by reason of his misconduct, is entitled to pledge his credit for necessaries supplied for the use of herself and their children, living with her; unless she is provided by him with an adequate maintenance, or an income which she has agreed to accept as adequate. Adultery by the wife, unless connived at or condoned by the husband, revokes such authority to pledge his credit.

[The case of the wife who justifiably, but against her husband's wish, leaves him, is, perhaps, the one case in which, by English

Law, agency does not now rest on agreement, express or implied. It would be a violent straining of argument to urge that authority to pledge the husband's credit in such circumstances was implicitly given by the husband by the fact of marriage.]

Rawlins v. *Vandyke* (1801) 3 Esp. 250; *Bazeley* v. *Forder* (1868) L. R. 3 Q. B. 559.

Johnston v. *Sumner* (1858) 3 H. & N. 261. If the maintenance is not provided by the husband, *quære.*

Negus v. *Forster* (1882) 46 L. T. 675; *Eastland* v. *Burchell* (1878) 3 Q. B. D. 432.

Wilson v. *Glossop* (1888) 20 Q. B. D. 354; *Harris* v. *Morris* (1801) 4 Esp. 41.

Atkyns v. *Pearce* (1857) 2 C. B. N. S. 763. Apparently adultery during cohabitation does not alter the wife's legal position (*Robinson* v. *Greinold* (1704) 1 Salk. 119).

134. A housekeeper or servant presiding over a man's household has the same authority, whilst so presiding (but not afterwards), to pledge his credit as a wife. *Housekeeper*

Ryan v. *Sams* (1848) 12 Q. B. 460; *Rencaux* v. *Teakle* (1853) 8 Exch. 682 (approved in *Debenham* v. *Mellon*, at p. 33).

135. A child, even though living with his parents, has no authority to pledge his parents' credit. *Child*

Mortimore v. *Wright* (1840) 6 M. & W. 482; *Shelton* v. *Springett* (1851) 11 C. B. 452.

136. A husband is responsible to third parties for the tortious acts of his wife (not being directly connected with, or by way of inducing, a contract); but a parent is not responsible for the tortious acts *Torts of wife and child*

or defaults of his child, unless they were committed with his actual authority, or at his instigation.

Liverpool Adelphi Loan Co. v. *Fairhurst* (1854) 9 Exch. 422; *Earle* v. *Kingscote* [1900] 2 Ch. 585.

Moon v. *Towers* (1860) 8 C. B. N. S. 611. (If the parent actually employs the child as his agent, he is, of course, responsible, as for any other agent.)

Ante-nuptial liabilities

137. A husband is liable for the ante-nuptial contracts and torts of his wife, to the extent of all property coming to him from or through her.

Married Women's Property Act, 1882, s. 14. Previously to the passing of the Married Women's Property Acts, the liability of the husband for his wife's ante-nuptial contracts and torts was unlimited, but disappeared with the dissolution of the marriage. *Quære*, whether the same rule applies to the statutory liability (*Beck* v. *Pierce* (1889) 23 Q. B. D. at p. 321).

Torts of servant

138. A master is responsible for the wrongful acts and defaults of his servant, done or committed in the course of the servant's employment; save that a master cannot be held liable by one servant for damage arising from the act or default of another servant employed by him in the same business, except in the cases provided for by the Employers' Liability Act, and the Workmen's Compensation Acts.

[The doctrine of "common employment" is, probably, a survival from the days of gild contracts and statute labour. The Acts mentioned in the text have destroyed much of its force; but there are still many callings to which their provisions do not apply.]

Bayley v. *Manchester &c. Ry Co.* (1873) L. R. 8 C. P. 148; *Degg* v. *Midland Ry. Co.* (1857) 1 H. & N. 773.

139. Where a person employs an independent contractor to do an act which is likely, unless carefully performed, to result in damage to a third party, and there is a duty cast upon such person to use reasonable care and skill, such person will be liable to the third party for the negligence of the contractor, whereby the third party suffers damage. *Contractor*

Hughes v. *Percival* (1883) L. R. 8 App. Ca. 443.

140. A person who employs a special agent is only responsible to third parties for acts and defaults of the agent which are authorized by him, or which are necessary or incidental to such acts or defaults. *Special agent*

Fenn v. *Harrison* (1790) 3 T. R. 757; *Brady* v. *Todd* (1861) 9 C. B. N. S. 592.

141. The relation of principal and agent may, as regards third parties, be terminated at any time, and in any manner, by either principal or agent; and it is *ipso facto* terminated by the death, unsoundness of mind, or bankruptcy of principal or agent, *Revocation of agency*

Blades v. *Free* (1829) 9 B. & C. 167; *Drew* v. *Nunn* (1879) 4 Q. B. D. 661; *Markwick* v. *Hardingham* (1880) 15 Ch. D. 339; *Hudson* v. *Granger* (1821) 5 B. & Ald. 31.

except that:—

(*a*) The revocation of an agent's authority (other than a revocation by death or bankruptcy) does not relieve the principal from responsibility for dealings of the agent with third persons,

with whom the principal has formerly dealt through the same agent, and who have no notice of the revocation;

Blades v. *Free, ubi sup.*; *Elliott* v. *Turquand* (1881) L. R. 7 App. Ca. 79.

Trueman v. *Loder* (1840) 11 A. & E. 589; *Re Oriental Bank Corp.* (1884) 28 Ch. D. 634.

(*b*) a person acting in good faith, on a power of attorney, is not rendered liable by the fact of a revocation, by death or otherwise, of which he had no notice;

Conveyancing Act, 1881, s. 47; Trustee Act, 1893, § 23; Conveyancing Act, 1882, ss. 8, 9.

(*c*) a power of attorney, executed after 31 Dec. 1882, given for valuable consideration, and expressed to be irrevocable, or, whether given for valuable consideration or not, expressed to be irrevocable for any fixed period not exceeding one year from its date, is, in favour of a purchaser, irrevocable, or irrevocable during that period (as the case may be) by any act of the principal (including his death, unsoundness of mind, and bankruptcy) done without the consent of the agent.

Agent's liability on contract

142. An agent, acting as such, is not personally liable to third parties on contracts entered into by him, or for monies received by him,

Jenkins v. *Hutchinson* (1849) 13 Q. B. 744; *Ellis* v. *Goulton* [1893] 1 Q. B. 350.

except that: —

(*a*) a person who executes a deed in his own name is personally liable on the covenants contained therein, even though he is expressed to execute it as agent;

Appleton v. *Binks* (1804) 5 East, 418.

(*b*) a person who accepts a bill of exchange drawn upon him in his own name, is personally liable, even though he accepts as agent;

Herald v. *Connah* (1876) 34 L. T. 885.

(*c*) by the custom of a particular trade, a person who enters into a contract as agent for an unnamed principal may be made personally liable;

Hutchinson v. *Tatham* (1873) L. R. 8 C. P. 482; *Pike* v. *Ongley* (1887) 18 Q. B. D. 708.

(*d*) a person who professes to act as an agent, without having any authority to do so, is personally liable to third parties, who deal with him on the faith of the alleged authority ("Warranty of authority"). This rule does not (probably) apply to public officials professing to contract on behalf of the crown;

Collen v. *Wright* (1857) 8 El. & Bl. 647; *Firbank's Exors.* v. *Humphreys* (1886) 18 Q. B. D. 54. (If the alleged agent knew that he had no authority, he may be liable in an action *ex delicto*.)
Dunn v. *Macdonald* [1897] 1 Q. B. 401, 555.

(*e*) a person acting as agent for a foreign principal, who does not become liable to the third

party, is presumed to be himself personally liable.

Hutton v. *Bulloch* (1874) L. R. 9 Q. B. 572. But the presumption of liability may be rebutted. (*Gadd* v. *Houghton* (1876) 1 Ex. D. 357.)

Agent's liability in tort

143. An agent is personally liable to third parties for torts committed by him, whether they were authorised by his principal or not. And it makes no difference that the agent thought he was acting lawfully.

Consolidated Co. v. *Curtis* [1892] 1 Q. B. 495.

Undisclosed principal

144. When a person, who apparently acts as a principal, is discovered to have been really acting as an agent, the true principal may be made liable by the persons with whom the agent has dealt,

Thomson v. *Davenport* (1829) 9 B. & C. at p. 86; *Calder* v. *Dobell* (1871) L. R. 6 C. P. 486.

except that: —

(*a*) no evidence contradicting the express terms of a written document can be adduced to prove the existence of the agency;

Humble v. *Hunter* (1848) 12 Q. B. 310.

(*b*) a person cannot (probably) be made liable on a deed in which he is not named as a party;

Re International Contract Co. (1871) L. R. 6 Ch. App. 525. (But see *Young* v. *Schuler* (1883) 11 Q. B. D. 651.)

(*c*) a foreign principal cannot be made liable on a contract made by his agent in England, unless it is proved that he actually authorised the agent to pledge his credit;

Hutton v. *Bulloch* (1874) L. R. 9 Q. B. 572; *Armstrong* v. *Stokes* (1872) L. R. 7 Q. B., at p. 605.

(*d*) a person cannot be made liable on a negotiable instrument, unless his name appears thereon, or unless he signs the same in a trade name, or unless a partner of a firm, of which he is or was a member, signs it in the partnership name;

Ducarrey v. *Gill* (1830) Moo. & Mal. 450; Bills of Exchange Act, 1882, ss. 23, 89. As to when the acceptance of a bill of exchange by an active partner will bind a dormant partner, see *Yorkshire Banking Co.* v. *Beatson* (1880) 5 C. P. D. 109.

(*e*) if the state of accounts between the principal and the agent has been altered owing to the conduct of the creditor, the latter cannot, to the prejudice of the principal, hold him liable;

Heald v. *Kenworthy* (1855) 10 Exch. 739; *Armstrong* v. *Stokes* (1872) L. R. 7 Q. B. 598. But the exception does not apply where the agent, though not naming his principal, admits that he is acting as an agent (*Irvine* v. *Watson* (1879) 5 Q. B. D. 102); and indeed there is some doubt whether it applies at all, unless the creditor has in some way induced the principal to believe that he may safely settle with the agent.

(*f*) a third party who, after discovering the existence of the principal, unequivocally manifests his intention of giving credit to the agent, cannot afterwards sue the principal;

Smethurst v. *Mitchell* (1859) 1 El. & El. 623.

(*g*) if a third party recovers judgment against the agent, he cannot (probably) afterwards sue the principal, even though the judgment remains unsatisfied.

Priestley v. *Fernie* (1865) 3 H. & C. 977; *Kendall* v. *Hamilton* (1879) L. R. 4 App. Ca. 514.

Mens rea

145. When, in order to affect a principal, it is necessary to prove the existence of a certain state of mind, it will be sufficient to prove the existence of that state of mind, either in the principal or in the agent.

Mayhew v. *Eames* (1825) 3 B. & C. 601; *Ludgater* v. *Love* (1881) 44 L. T. 694.
Blackburn v. *Haslam* (1888) 21 Q. B. D. 144.

Action by undisclosed principal

146. An undisclosed principal may declare himself, and assume any contract entered into on his behalf, unless the establishment of the agency would contradict a statement in a written document. But a principal who allows his agent to act as a principal, cannot prejudice the rights of third parties against the agent, acquired before notice of the agency.

Browning v. *Provincial Insce. Co.* (1875) L. R. 5 P. C. 263.
Humble v. *Hunter* (1848) 12 Q. B. 310. *Quære*, whether this qualification extends to verbal statements (*Lucas* v. *De La Cour* (1813) 1 M. & S. 249). Where a person describes himself as an agent for an unnamed principal, but is in fact acting on his own behalf, he may sue on the con-

tract, even though it is in writing (*Schmalz* v. *Avery* (1851) 20 L. J. Q. B. 228).

Borries v. *Imperial Ottoman Bank* (1873) L. R. 9 C. P. 38; *Cooke* v. *Eshelby* (1887) L. R. 12 App. Ca. 271; *Montagu* v. *Forwood* [1893] 2 Q. B. 350.

Action by agent

147. An agent expressed to contract as such, cannot sue on the contract in his own name, whether the name of the principal has been actually disclosed or not,

Fairlie v. *Fenton* (1870) L. R. 5 Ex. 169.

unless: —

(*a*) he has a special property in the subject-matter of the contract, or an interest in the completion of the contract;

Williams v. *Millington* (1788) 1 H. Bl. 81.

(*b*) the other party, with knowledge of the facts, has consented to treat him as a principal;

Rayner v. *Grote* (1846) 15 M. & W. 359.

(*c*) he is suing on a contract of insurance effected by him as broker with the authority of his principal;

Sunderland Co. v. *Kearney* (1851) 16 Q. B., at p. 939.

(*d*) the contract was made by deed, to which the principal was not a party.

Gibson v. *Winter* (1833) 5 B. & Ad. at p. 102.

(*e*) he has entered into the contract on behalf of a foreign principal.

There is extraordinarily little direct authority for this proposition ; but it is clearly implied in *Willis* v. *Baddeley* [1892] 2 Q. B. 324, and it is believed to be constantly acted upon in practice.

And, when he does so, all defences which would have been available against his principal are available against him.

Rogers v. *Hadley* (1863) 2 H. & C. 227 ; *Willis* v. *Baddeley* (*ubi sup.*).

SECTION IV

TIME

148. A legal day consists of twenty-four hours, and begins and ends at midnight. *Day*

Co. Litt. 135a; *Migotti* v. *Colville* (1879) 4 C. P. D. 233. Time, in a legal document, means Greenwich mean time (Statutes (Definition of Time) Act, 1880).

149. Fractions of a day are not taken into account in calculating periods of time; but, if two or more acts or events occur on the same day, the order in which they occur may be proved, except as against claims by the Crown. *Part of a day*

R. v. *St. Mary's, Warwick* (1853) 1 El. & Bl. 816; *Smith* v. *Gold Coast &c. Ld.* [1903] 1 K. B. 285.
Tabernacle Building Society v. *Knight* [1892] A. C. 298.
R. v. *Edwards* (1853) 9 Exch. 52, 628.

150. A judicial act is deemed to have been done at the earliest hour of the day on which it actually took place. *Judicial acts*

Wright v. *Mills* (1859) 4 H. & N. 488. The issue of an ordinary writ of summons is not a judicial act (*Clarke* v. *Bradlaugh* (1881) 8 Q. B. D. 63).

Acts of Parliament

151. An Act of Parliament comes into force at the expiration of the day previous to that on which it received the Royal Assent, or (as the case may be) on which it is fixed by Parliament to commence.

Acts of Parliament (Commencement) Act, 1793; Interpretation Act, 1889, s. 36.

Sundays

152. In the absence of usage to the contrary, when a period of time is fixed, either by law or by agreement, for the doing of an act, Sundays are included in the reckoning; but this rule does not apply to periods of less than six days, allowed or prescribed by statute or Order of Court for taking legal proceedings.

Brown v. *Johnson* (1842) 10 H. & N. 331.
R. S. C. 1875, O. LXIV. r. 1.

Holidays

153. When the time allowed by statute or Order for doing any act expires on a Sunday, or other holiday, such act may be duly done on the next business day; but this rule does not apply to contracts, except that, when a bill of exchange or promissory note falls due on a Bank Holiday, payment or notice of dishonour is effectual, if made on the following business day.

Morris v. *Barrett* (1859) 7 C. B. N. S. 139; *Hughes* v. *Griffiths* (1862) 13 C. B. N. S. 324; R. S. C. 1875, O. LXIV. r. 3.

E. g. a bill of exchange which falls due on a Sunday is payable on the previous day (Bills of Exchange Act, 1882, s. 14 (1) (a)).

Bank Holidays Act, 1871, ss. 1, 2.

Sunday trading

154. Any contract entered into by a tradesman, artificer, workman, or labourer, in the ordinary course of his trade or calling, on a Sunday, is void. But this rule does not apply to other contracts, or to works of necessity or charity; and a bill of exchange, promissory note, or cheque, is not invalid, only by reason that it bears date on a Sunday.

Sunday Observance Act, 1677, s. 1; *Fennell* v. *Ridler* (1826) 5 B. & C. 406.

Scarfe v. *Morgan* (1838) 4 M. & W. 270; *Palmer* v. *Snow* [1900] 1 Q. B. 725.

R. v. *Younger* (1793) 5 T. R. 449.

Bills of Exchange Act, 1882, s. 13 (2).

Month

155. In legal matters, unless the contrary is to be gathered from the context, the word "month" means a lunar month of twenty-eight days,

R. v. *Chawton* (1841) 1 Q. B. 247.

Lacon v. *Hooper* (1795) 6 T. R. 224; *Rogers* v. *Dock Co.* (1865) 34 L. J. Ch. 165; *Hutton* v. *Brown* (1881) 45 L. T. 343; *Bruner* v. *Moore* [1904] 1 Ch. 305.

but: —

(*a*) In Acts of Parliament passed after the year 1850, and in Rules of Court, and documents which are part of legal procedure, it means, unless a contrary intention appears, a calendar month;

Interpretation Act, 1889, s. 3; R. S. C. 1875, O. LXIV. r. 1.

(*b*) In bills of exchange, promissory notes, and contracts for the sale of goods, it means (*prima facie*) a calendar month;

Bills of Exchange Act, 1882, s. 3; Sale of Goods Act, 1893, s. 10 (2).

(*c*) A "twelve-month" means a period of twelve calendar months; and a "half-year" (*tempus semestre*) means a period of six calendar months;

Catesby's Case (1607) 6 Rep. 62 a.
s. c. Cro. Jac. 166.

(*d*) A "six months" notice, required to determine a tenancy commencing on one of the usual quarter days, means a notice extending over two customary quarters of a year.

Morgan v. *Davies* (1878) 3 C. P. D. 260.

Reckoning in months

156. In calculating a calendar month, the time is reckoned from the day on which the period commences, to the corresponding day in the following month, and so on. If there is no corresponding day in the last month, the last day of that month is reckoned as the expiration of the period.

Freeman v. *Read* (1863) 4 B. & S. 174.
Migotti v. *Colville* (1879) 4 C. P. D. at p. 238.

Inclusive and exclusive days

157. Generally speaking, when a time is fixed for the currency of an interest, or the period of a delay or imprisonment, the day on which the currency or period commences is included in the reckoning; and the currency or period expires at midnight of the last day. But when a period is allowed for the doing

of an act, the day on which the period commences is not included.

Russell v. *Ledsam* (1845) 14 M. & W. at p. 582; *Migotti* v. *Colville, ubi sup.*

Migotti v. *Colville, ubi sup.*

Lester v. *Garland* (1808) 15 Ves. 248; *Radcliffe* v. *Bartholomew* [1892] 1 Q. B. 161; *Re North* [1895] 2 Q. B. 264.

SECTION V

LIMITATION OF ACTIONS

Limitation of actions

158. The right to bring an action, to enforce a civil claim, is barred by the expiration of a period which begins to run from the time at which the right to bring the action accrued.

Limitation Act, 1623, s. 3; Civil Procedure Act, 1833, s. 3; Real Property Limitation Act, 1833, ss. 2, 40; 1874, ss. 2, 8. (In the case of claims to recover land, rent, or money charged on land, distress and entry are barred when the action is barred. Real Property Limitation Acts, 1833 and 1874, *passim*.)

Periods

159. Subject to §§ 162–167, the following are the respective periods, on the expiration of which the right to bring actions is barred, viz.: —

(*a*) In the case of a claim to recover money due upon a deed or recognizance, or to proceed on a recognizance by *scire facias*, or to enforce a specialty contract, or to recover the personal estate of an intestate from his representatives, or from the Crown — a period of twenty years;

Civil Procedure Act, 1833, s. 3.
Law of Property Amendment Act, 1860, s. 13.
Intestates Estates Act, 1884, s. 3.

(*b*) In the case of a claim to recover land, or money charged on land, or rent (including tithe-rent-charge), or a legacy — a period of twelve years;

Irish Land Commission v. *Grant* (1884) L. R. 10 App. Ca. 14.
Real Property Limitation Act, 1874, ss. 1, 8. (But where the money charged on land is only a simple contract debt, the personal action will be barred at the expiration of six years. *Barnes* v. *Glenton* [1899] 1 Q. B. 885.)

(*c*) In the case of a claim for trespass to the person, assault, or false imprisonment — a period of four years;

Limitation Act, 1623, s. 3 (3).

(*d*) In the case of a claim for defamation by spoken words actionable *per se* ("slander") or for penalties, damages, or sums of money given by statute to the party grieved (except where such statute otherwise provides) — a period of two years;

Limitation Act, 1623, s. 3 (4).
Civil Procedure Act, 1833, s. 3.

(*e*) In the case of a claim by auditors against Poor Law Guardians and officers — a period of nine months;

Poor Law Amendment Act, 1849, ss. 9, 11.

(*f*) In the case of a claim for any act done in pursuance of, or for any neglect of duty under,

any Act of Parliament, or of any public duty or authority — a period of six months;

Constables Protection Act, 1750, s. 8; Public Authorities Protection Act, 1893, s. 1 (a). Presumably, this latter Act repeals s. 170 of the Army Act, 1881, which allows twelve months for proceeding under that Act. (As to what constitutes an act or neglect connected with a public duty, see *Sharpington* v. *Fulham Guardians* [1904] 2 Ch. 449.)

(*g*) In the case of a claim against the Heir Apparent to the Crown — a period of three calendar months after particulars of the claim have been duly delivered to his principal officer;

Heir Apparent's Establishment Act, 1795, s. 9. The particulars must be delivered within ten days after the expiration of the quarter in which the demand accrued (s. 7), and the action must be brought against the officer, and not against the Heir Apparent (s. 9).

(*h*) In the case of any other claim — a period of six years.

Limitation Act, 1623, s. 3 (2); 4 Anne (1705), c. 16, s. 17; Mercantile Law Amendment Act, 1856, s. 9.

Acknowledgment

160. A written acknowledgment of the claimant's title, or a payment to him or to any person through whom he claims, on account of principal, rent, or interest, by the person in possession of the land, or liable to the debt or damages for breach of contract, will cause the period of limitation to recommence; except that, when a claim to land, or rent, or a legacy, has become unenforceable by action on account of lapse of time, no subsequent acknowledg-

ment or payment will revive it. But the acknowledgment, in the case of claims on simple contract, must be such, that a promise to pay may be reasonably inferred from it.

Statute of Frauds Amendment Act, 1828, s. 1; Real Property Limitation Act, 1833, s. 14; Mercantile Law Amendment Act, 1856, s. 13.

Civil Procedure Act, 1833, s. 5; Real Property Limitation Act, 1833, s. 3; 1874, s. 8.

Real Property Limitation Act, 1833, s. 34; 1874, s. 8; *Kibble* v. *Fairthorne* [1895] 1 Ch. 219.

Foster v. *Dawber* (1851) 6 Exch. at p. 853; *In re River Steamer Co.* (1871) L. R. 6 Ch. App. 822; *Lusher* v. *Hassard* (1904) 20 T. L. R. 563.

Co-debtors

161. An acknowledgment or payment by one of co-owners or co-debtors, co-executors or co-administrators, will not prevent the period of limitation running in favour of the others, unless the person making it is entitled to act, and does act, as their agent. But the payment of interest by a tenant for life under a devise, on a debt due from the testator, prevents the period running in favour of the remaindermen; and an acknowledgment by one of several co-executors will prevent the period running in favour of the testator's estate.

Statute of Frauds Amendment Act, 1828, s. 1; Mercantile Law Amendment Act, 1856, s. 14; Real Property Limitation Act, 1874, s. 7; *Dickenson* v. *Teesdale* (1862) 1 De G. J. & S. 52; *Richardson* v. *Younge* (1871) L. R. 6 Ch. App. 478.

Wood v. *Braddick* (1808) 1 Taunt. 104; *Re Frisby* (1889) 43 Ch. D. 106.

Roddam v. *Morley* (1857) 1 De G. & J. 1; *Re Hollingshead* (1888) 37 Ch. D. 651.

Re Macdonald [1897] 2 Ch. 181.

Joint claimants

162. An acknowledgment by or payment to one of joint claimants prevents the period of limitation running against the others.

Young v. *Lord Waterpark* (1839) 8 L. J. Ch. 214; Real Property Limitation Act, 1874, s. 7. (But the claimants must really be joint, and not several. *Ashlin* v. *Lee* (1875) 44 L. J. Ch. 376.)

"Concealed fraud"

163. Where, through the fraud of the defendant, or of some one through whom he claims, or for whose acts he is responsible, a cause upon which the claimant bases his action was not discovered by him, or by the person through whom he claims, at the time when it arose, the period of limitation will not begin to run against the claimant until he has discovered, or with reasonable diligence might have discovered, the commission of the fraud.

Real Property Limitation Act, 1833, s. 26; *Bulli Coal Co.* v. *Osborne* [1899] A. C. 351; *Re McCallum* [1901] 1 Ch. 143. (Probably a similar rule applies where, owing to a mutual mistake, a claimant has remained in ignorance of his rights. *Harris* v. *Harris* (1861) 29 Beav. 110.)

Trustees

164. A trustee may not take the benefit of the Statutes of Limitation, if he has been guilty of a fraudulent breach of trust, or if he still retains the property which is the subject of the action, or its proceeds, or has previously converted the same to his own use.

Trustee Act, 1888, s. 8; *How* v. *Winterton* [1896] 2 Ch. 626.

Disabilities

165. Except in respect of claims to advowsons, and to arrears of rent and interest, the period of limitation does not begin to run against a person who was an infant, or of unsound mind when his right accrued, until the attainment of his majority, or the recovery of his sanity; but a period which has once commenced to run is not suspended by the occurrence of infancy or insanity.

De Beauvoir v. *Owen* (1850) 5 Exch., at p. 182.

Limitation Act, 1623, s. 7; Civil Procedure Act, 1833, s. 4; Real Property Limitation Act, 1874, ss. 3, 5. But, in the case of actions to recover land or rent, the period after the removal of the disability is six years only; and the extreme limit is thirty years from the accrual of the cause of action. The disability of marriage is now, virtually, abolished. *Lowe* v. *Fox* (1885) 15 Q. B. D. 667; Trustee Act, 1888, s. 8 (b).

Goodall v. *Skerratt* (1855) 3 Drew. 216; *Murray* v. *Watkins* (1890) 62 L. T. 796.

Future interests

166. The period of limitation does not begin to run against a person entitled to a future interest in land or rent, until the determination of the immediately preceding estate or interest. But if the owner of a preceding interest is out of possession at the determination of his interest, the owner of the future interest has only six years from the natural determination of the preceding interest, or twelve years from the time when the owner of the preceding interest ceased to be in possession, whichever is the longer period.

Real Property Limitation Act, 1874, s. 2.

Estates tail

167. When the period of limitation begins to run against a tenant-in-tail, it begins to run also against all persons whose interests he is entitled to bar; and it begins to run against the remainderman, in favour of a person taking under an assurance by a tenant-in-tail, which does not bar the remainder, from the time at which such tenant-in-tail could have barred the remainder.

Real Property Limitation Act, 1833, ss. 21,22, 23; 1874, s. 6.

Short tenancies

168. When a person is in possession of land as tenant-at-will, the period of limitation begins to run against the lessor, from the expiry of the first year of the tenancy; and when a person is in possession of land as a tenant-from-year-to-year, or other period, without any lease in writing, the period begins to run against the lessor from the expiry of the first year or other period of tenancy, or from the last receipt of rent, whichever last happens.

Real Property Limitation Act, 1833, s. 7.
Ibid. s. 8.

Corporations sole

169. No land or rent may be recovered by an ecclesiastical or eleemosynary corporation sole after the expiry of two incumbencies and six years, from the time at which the right of the corporation ac-

crued, or after the expiry of sixty years from that date, whichever is the longer period.

Real Property Limitation Act, 1833, s. 29. (The six years are reckoned from the appointment of the third incumbent, not from the happening of the vacancy.)

Advowsons

170. A claim to the patronage of a church ("Advowson"), cannot be enforced after the expiry of three adverse incumbencies, or sixty years, whichever period is the longest; and no claim to such patronage can be enforced, after one hundred years from the appointment of an adverse incumbent.

Real Property Limitation Act, 1833, ss. 30, 31; Limitation of Actions Act, 1843, s. 3. (Incumbencies filled on the lapse of the patron's rights are counted; but not incumbencies filled by the Crown, on the promotion of the former incumbent to a bishopric.)

Crown suits

171. Claims by and against the Crown, other than claims in respect of the personal estate of a deceased person, are not affected by the ordinary Statutes of Limitation; but the claims of the Crown to real property and chattels real (other than franchises and liberties) are barred at the expiry of sixty years from the time at which they arose, or from the last receipt of rent in respect thereof.

Intestates Estates Act, 1884, s. 3.
Rustomjee v. *The Queen* (1876) 1 Q. B. D. 491.
Crown Suits Acts, 1769, s. 1; 1861, s. 1.

Extinction of title

172. When the right to bring an action to recover land, rent, or an advowson, is barred by the expiry of the period of limitation, the title of the person barred is extinguished; but this rule does not apply to claims for debt or damages, or for money charged on land, or to claims by the Crown.

Real Property Limitation Act, 1833, s. 34.
Re Lane (1889) 23 Q. B. D. 74.
Re Lord Clifden [1900] 1 Ch. 774.
Goodtitle d. Parker v. *Baldwin* (1809) 11 East, 488. The consequence of this exception is, that claims falling within it can (probably) be enforced by any lawful means, other than the bringing of an action; *e.g.* by retainer, set-off, seizure, &c.

Arrears of tithe rent-charge

173. Not more than two years' arrears of tithe-rent charge can be recovered.

Tithe Act, 1836, s. 81; *Payne* v. *Esdaile* (1888) L. R. 13 App. Ca. 613. Tithe-rent-charge is recovered by distress, or the appointment of a receiver; not by action.

Other arrears

174. Not more than six years' arrears of rent, or any other periodical payment, can be recovered by distress or action, even though the payment is secured by express trust.

Limitation Act, 1623, s. 3; Real Property Limitation Act, 1833, ss. 41, 42.
Real Property Limitation Act, 1874, s. 10.

Agricultural holding

175. The landlord of an "agricultural holding" may not distrain for rent after the expiry of one year

from the legal or customary date for the payment thereof; and a landlord who distrains upon a bankrupt tenant cannot recover, by distress, arrears of rent due more than six months prior to the Order of adjudication in the tenant's bankruptcy. *Bankruptcy*

Agricultural Holdings Act, 1883, s. 44. (But, of course, he may *sue* for six years' arrears.)

Bankruptcy Act, 1883, s. 42; 1890, s. 28. (But he may prove in the tenant's bankruptcy for any amount not exceeding six years' arrears.)

SECTION VI

SELF HELP

Self-defence

176. A person who, or whose wife, child, master, or servant, is threatened with wrongful physical harm, or whose possession is wrongfully interfered with, is justified in employing, against the wrong-doer, force apparently necessary to prevent the accomplishment or continuance of that harm or interference.

Blackstone, *Comm.* III. 120, 121; Y. B. 21 Hen. VII. (1505) 39 *a*, pl. 50; *Weaver* v. *Bush* (1798) 8 T. R. 78; *R.* v. *Smith* (1837) 8 C. & P. 160; *R.* v. *Symondson* (1896) 60 J. P. 645.

Seizure of chattels

177. A person entitled to the possession of a chattel may seize it, by force if necessary; but no one may take possession of land by force.

Blades v. *Higgs* (1861) 10 C. B. (N. S.) 713. He may even enter upon the land of a wrong-doer for the purpose (*Patrick* v. *Colerick* (1838) 3 M. & W. 483); but not of an innocent third party (*Anthony* v. *Haneys* (1832) 8 Bing. 186).

5 Ric. II. (1381) st. I., c. 8; 8 Hen. VI. (1429) c. 9, ss. 2, 7. But the remedy for breach of the statutes is a criminal one; and, though the person dispossessed is entitled to be restored by the Justices, he has, probably, no action for damages, if the claim of the dispossessor is really lawful (*Harvey* v. *Bridges* (1845) 14 M. & W. 437; *Scott* v. *Brown* (1885) 51 L. T. 746).

Distress

178. If rent or other annual sum charged upon land, or the income thereof, is in arrear, the person

entitled to receive the same may enter upon the land, and seize and sell the chattels found thereon, to satisfy his claim ("Distress").

[The right extends to goods fraudulently removed to avoid a distress (Distress for Rent Act, 1737, s. 1) until they have come into the hands of a *bonâ fide* purchaser for value. It takes precedence also, subject to various exceptions, of the claims of the tenant's other creditors, and even of his trustee in bankruptcy.]

2 W. & M. st. 1, c. 5 (pr.) as to ordinary rent; Landlord and Tenant Act, 1730, s. 5, as to rents seck; Conveyancing Act, 1881, s. 44, as to other annual charges created after 1881. The exercise of the right of distress is subject to many regulations and restrictions. (See especially, Lodgers' Goods Protection Act, 1871; Law of Distress Amendment Act, 1888. If the distress is levied under the Conveyancing Act, 1881, the rent or sum claimed must be in arrear for twenty-one days.)

Rent-charges

179. When an annual charge, created by an instrument coming into operation after 31st December, 1881, is in arrear for forty days, the person entitled to receive the same may enter upon the land, and retain possession until his claim has been satisfied out of the incomings of the land, or may demise the land to a trustee who may, by mortgage, sale, or demise, raise the rent-charge, and the arrears thereof, and all future payments to become due under the same, for the benefit of the claimant.

[These powers may be excluded or modified by the instrument creating the charges. They do not apply to ordinary rent-service.]

Conveyancing Act, 1881, s. 44 (3) (4).

Damage feasant

180. A person lawfully in possession of any land may seize and impound any chattels or animals coming unlawfully thereon, and causing encumbrance or damage, if they are not removed by their owner within a reasonable time ("Distress damage feasant"). But he cannot exercise this right, if he has contributed to the trespass by his own negligence, or if the chattels or animals are in the actual use of any person. He may also remove such chattels or animals; but, if their presence on the land was due to his own negligence, he must remove them in such a manner as not to cause them harm.

Ambergate Ry. Co. v. *Midland Ry. Co.* (1853) 2 El. & Bl. 793; *Tyrringham's Case* (1585) 4 Rep. at 38 b.
Goodwin v. *Cheveley* (1859) 4 H. & N. 631; *Boden* v. *Roscoe* [1894] 1 Q. B. 608.
Singleton v. *Williamson* (1861) 7 H. & N. 410.
Field v. *Adams* (1840) 12 A. & E. 649.
Carruthers v. *Hollis* (1838) 8 A. & E. 113.

Overhanging branches

181. The occupier of land is justified in cutting branches of trees growing in his neighbour's land, which overhang his own land, without giving notice to his neighbour of his intention so to do.

Lemmon v. *Webb* [1895] A. C. 1.

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